IN THE

Supreme Court of the United States

OCTOBER TERM 1978-79

No. 78-1817

FORD MOTOR CREDIT COMPANY,

Petitioner,

v.

COLONIAL FORD, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner, Ford Motor Credit Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding upon rehearing on February 5, 1979.

Opinions Below

The initial opinion of the court of appeals is reported at 577 F.2d 106. The opinion of the court of appeals upon rehearing is reported at 592 F.2d 1126. For the convenience of the Court, both opinions are reprinted in the Appendix hereto.

Jurisdiction of the Court

The judgment of the court of appeals upon rehearing was entered on February 5, 1979. This Petition for Certiorari was filed on or before June 5, 1979, pursuant to this Court's Order of April 24, 1979. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

Questions Presented

1. Whether the lending business of a financial institution, which is not a party to the franchise agreement between an automobile manufacturer and its dealer, is automatically subject to the standards imposed upon automobile franchisors by the Automobile Dealer's Franchise Act, 15 U.S.C. §§ 1221-25 (1976) ("the Act"), merely because the financial institution is a subsidiary of an automobile manufacturer.

2. Whether a financial institution, which is a subsidiary of an automobile manufacturer, must be irrebuttably presumed to be under the control of the manufacturer in connection with the distribution of automobiles, and therefore subject to the Act, notwithstanding a contrary finding by a jury.

Statutory Provisions Involved

In pertinent part, Title 15 of the United States Code provides as follows:

§ 1221. Definitions

As used in this chapter—

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation,

association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

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§ 1222. Authorization of suits against manufacturers; amount of recovery; defenses

An automobile dealer may bring suit against any automobile manufacturer . . . and shall recover the damages by him sustained and the cost of the suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer. . . .

The complete text of the Automobile Dealer's Franchise Act is set forth in the Appendix hereto.

Statement of the Case

Colonial Ford ("Colonial"), a Ford dealer in Salt Lake City, Utah, complained in the proceedings below that the defendants, Ford Motor Company ("Ford Motor") and

Ford Motor Credit Company ("Ford Credit"), had conspired to deprive Colonial of its rights as a franchised dealer in violation of both the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and the Automobile Dealer's Franchise Act, 15 U.S.C. §§ 1221-25 (1976). Colonial alleged that Ford Motor had violated the Franchise Act by imposing certain management and adequate-facilities requirements upon Colonial when it was franchised in 1969. In addition, Colonial alleged that in 1972 Ford Motor forced Colonial to accept financing of its physical plant and wholesale inventory from Ford Credit—financing which was terminated in 1975 when Colonial repeatedly failed to make timely payments.

Ford Credit is a financial institution engaged in consumer lending; commercial, industrial and real estate financing; damage, life and health insurance; as well as the financing of automobile dealers. It is a subsidiary of Ford Motor.

Colonial did not allege that Ford Credit was a party to the franchise agreement between Ford Motor and Colonial. Rather, Colonial claimed that "to the extent [Ford Motor's] coercion and intimidation involved the defendant Ford Credit," Ford Credit also violated the Automobile Dealer's Francise Act. Complaint ¶ 22.

On August 18, 1975, the district court issued a preliminary injunction enjoining Ford Credit from foreclosing on its deed of trust covering Colonial's physical plant or repossessing Colonial's inventory of automobiles. The injunction was issued even though Colonial was in substantial default to Ford Credit under the terms of its financing

agreement. The preliminary injunction further obligated Ford Credit to continue to finance Colonial's wholesale floorplan—that is, its purchases of automobiles for its showroom and inventory—during the litigation of Colonial's complaint and Ford Credit's counterclaim under the loan agreement.

Trial began before a jury on June 4, 1976. The evidence presented at trial established that Colonial—which had a franchise relationship with Ford Motor since 1969—had not been forced to accept financing from Ford Credit in 1972. To the contrary, Colonial, like its predecessor, utilized credit from other financial institutions until 1972 when Colonial decided to expand its facilities. Colonial negotiated with a number of firms for its credit needs, promising that the one which gave Colonial the most favorable terms on its real estate financing would also receive Colonial's other credit business. It was only after Ford Credit offered Colonial more favorable financing than competing financial institutions had offered that Colonial entered into a loan agreement with Ford Credit in 1972.[1]

The evidence at trial further established that in 1973 Colonial began to suffer from its owners' failure to maintain adequate capital in the dealership. By the summer of 1974, Colonial's undercapitalization problems had worsened to the point that Colonial was unable to pay Ford

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[1] In 1972 Colonial entered into a wholesale floor plan financing agreement with Ford Credit under which loans were secured by Colonial's inventory of new cars. Under the terms of the agreement, Colonial was obligated to pay Ford Credit promptly upon the sale of a financed vehicle. Ford Credit also committed itself to extend a real estate loan to Colonial upon completion of its new dealership facilities. Construction funds for the new facilities were, however, provided by a local bank. The Ford Credit real estate loan was made in 1973 and secured by a deed of trust.

Credit for the financed vehicles it had sold. It attempted to bring itself into compliance with the loan agreement by issuing a $55,749 check to Ford Credit which was not covered by sufficient funds. Despite this substantial violation of the loan agreement, Ford Credit did not foreclose on its collateral security. Rather, Ford Credit requested that the owners of Colonial secure sufficient operating capital to assure Colonial's ability to comply with the financing agreement. In the spring of 1975, however, when Colonial defaulted still further and failed to secure the necessary additional capital, Ford Credit advised Colonial that it would discontinue its wholesale financing on May 15, 1975—the date Colonial filed its complaint.

Based on this evidence, the jury found that neither Ford Motor nor Ford Credit had acted in violation of the Sherman Act. The jury found that Ford Motor, the automobile manufacturer, had violated the Automobile Dealer's Franchise Act and was therefore liable to Colonial in the amount of $210,000. The jury found, however, that Ford Credit, the financial institution, had not violated the Franchise Act.

From June 24, 1976, the day of the jury's verdict, until October 1976, Ford Credit continued to provide new financing to Colonial under the terms of the prior preliminary injunction. During that period the amount of Colonial's out of trust indebtedness to Ford Credit increased substantially as a result of Colonial's failure to pay Ford Credit as it sold financed vehicles.

On October 29, 1976, the district court entered a final judgment in favor of Ford Credit on its counterclaim for breach of the loan agreement in the amount of $2,897,125. Although the court relieved Ford Credit of that part of the

injunction which required Ford Credit to extend new financing to Colonial, the court continued to restrain Ford Credit from foreclosing on the real property, fixtures or accounts receivable securing the loan pending Colonial's appeal to the Tenth Circuit.

On appeal, Colonial challenged the district court's instruction to the jury that Ford Credit could be held liable under the Automobile Dealer's Franchise Act only if Colonial had established that, in its financial dealings with Colonial, (1) Ford Credit had acted for and under the control of Ford Motor, (2) Ford Credit's acts had been in connection with the distribution of automobiles, and (3) Ford Credit had failed to act in good faith in performing or complying with the terms of the franchise agreement between Ford Motor and Colonial. Colonial argued that Ford Credit, as a wholly owned subsidiary of Ford Motor, should have been held liable under the Franchise Act for the conduct of Ford Motor as a matter of law, despite the fact that Ford Credit was not a party to the franchise agreement.

In respons[illegible] Ford Credit contended, *inter alia*, (1) that it could not be held liable under the Franchise Act because it was not a party to the franchise agreement between Ford Motor and Colonial, and (2) that the jury had properly found that Ford Credit was not liable under the Act because it was not operating under the control of Ford Motor in connection with the distribution of automobiles.

In its initial decision, the Tenth Circuit rejected Colonial's contention that Ford Credit should have been held liable for the conduct of Ford Motor and affirmed the jury verdict in favor of Ford Credit. The court, following the decisions of three other courts of appeals, began its

analysis by noting that the Franchise Act is directed at the core franchise relationship between automobile manufacturers and their dealers. In the words of the court, the Act is

> "directed *to* manufacturers, to assemblers, and to distributors of automobiles. It is further directed to the performance or termination of the franchise agreement between those so engaged and the dealers." 577 F.2d at 108. (A. 4a.)

Since it was "apparent from the record that Ford Credit is not a manufacturer, assembler, or distributor, and further that it had no franchise agreement" with Colonial, the court of appeals found that the Act "on [its] face . . . was not applicable to Ford Credit." *Id.* (A. 4a-5a.)

The Tenth Circuit recognized that the definition of "automobile manufacturer" in the Act includes a firm which "acts for or is under the control of" a manufacturer; but the court held that this issue of "control" is a question of fact that must be answered by the trier of fact in each case:

> "[T]he 'acts for' or 'under the control' provisions must relate to the transactions or circumstances out of which the cause of action arose. Testimony and evidence must develop these factors in each case. . . ." *Id.* at 108-09. (A. 5a.)

The court of appeals noted that the issue of control had been fully developed in the testimony of the Ford Credit official who had made the decision to terminate Colonial's financing. *Id.* at 109. (A. 5a.) The court held that although Ford Credit's status as a wholly owned subsidiary of Ford Motor was a factor to be considered by the

jury in determining whether Ford Motor had exercised control with respect to the particular conduct at issue, "in the abstract it could not be a determining factor." *Id.* (A. 5a.) The court concluded, on the basis of the evidence presented at trial, that Ford Credit's relationship to Colonial was that of a financial institution to a borrower, "no different from that occupied by the local bank which had previously floor-planned for [Colonial]." *Id.* (A. 5a.)

The court of appeals also held that the district court had correctly allowed the jury to decide the question of Ford Credit's relationship to both Ford Motor and to Colonial:

> "The fact question was thus properly submitted to the jury, and it decided it.
>
> ". . . We thus find no error in the submission of the Dealer Act question as to Ford Credit to the jury, and the verdict must stand." *Id.* (A. 6a.)

The district court's judgment, imposing liability under the Act upon Ford Motor but imposing no such liability upon Ford Credit, was affirmed. (Judge McKay dissented from the portion of the court's opinion which affirmed the jury verdict in favor of Ford Credit.)

Colonial petitioned the court of appeals for rehearing with respect to the question of Ford Credit's liability under the Franchise Act. Consistent with Rule 40(a) of the Federal Rules of Appellate Procedure, Ford Credit awaited notification as to whether rehearing would be granted and did not file any brief in response to Colonial's petition.

On September 27, 1978, the court of appeals granted Colonial's petition for rehearing, but through an error in the clerk's office, Ford Credit was never notified of that fact.

As a result, Ford Credit was never given an opportunity to respond to Colonial's brief on rehearing.

On February 5, 1979, the same panel of the Tenth Circuit reversed its initial decision. The court adopted Colonial's contention that:

> "a wholly-owned subsidiary which acts for a manufacturer in connection with the distribution of automobiles is subject to the [Franchise] Act as a matter of law and that the jury should have been so instructed." 592 F.2d at 1128-29. (A. 19a.)

The court held that, as a matter of law, a wholly owned subsidiary of an automobile manufacturer involved in the financing of a dealer is "within the remedial purposes of the Act whether or not it is shown that the manufacturer ordered the specific conduct complained of." *Id.* (A. 20a.) The court of appeals ordered a new trial to determine Ford Credit's liability under the Act. 592 F.2d at 1130. (A. 21a.)

Upon learning of the court of appeals' reversal of its original decision, Ford Credit petitioned for further review, noting that it had never been given an opportunity to brief the issues on rehearing. On March 1, 1979, the court denied Ford Credit's request. (A. 24a.)

Reasons for Granting the Writ

There are approximately 24,000 automobile dealers in the United States who have franchise relationships with automobile manufacturers. These relationships were intended to be covered by the Franchise Act. These same dealers also have financial relationships with various financial institutions. These financial relationships were not

intended to be covered, and heretofore have not been covered, by the Franchise Act.

The decision below ignores this distinction between franchise and financial relationships and interprets the Franchise Act in a discriminatory and anticompetitive manner. It exposes certain financial institutions to the burdens of extensive litigation and liability in the federal courts under the standards of the Franchise Act—standards wholly unsuited to the lender-borrower relationship—merely because these institutions are affiliated with automobile manufacturers. It thereby puts these financial institutions at a distinct competitive disadvantage in relation to their unaffiliated rivals. This is not what Congress had in mind when it enacted the Franchise Act.

As its name implies, the Automobile Dealer's Franchise Act was intended to apply to the franchise relationship between an automobile manufacturer and its dealers. That is all. The Tenth Circuit's decision on rehearing constitutes an unwarranted extension of the Act to financial institutions which are not parties to any franchise agreement between an automobile manufacturer and a dealer.

This Court has never decided a case arising under the Franchise Act. However, the Tenth Circuit's holding—that a financial institution, which is not a party to a franchise agreement, is subject to the Act merely because it is a subsidiary of a manufacturer—is in direct conflict with the consistent rulings of every other court of appeals and district court which has considered the question. As those other courts have held, both the express terms and the legislative history of the Act make it clear that the Act's "good faith" standard applies only to the franchise relationship between a manufacturer and its dealer. The Act

was never intended to govern unrelated financial dealings between a dealer and a financial institution.

I.

The Decision Below Conflicts With the Decisions of Three Other Courts of Appeals, as Well as the Terms and Legislative History of the Act, in Holding That a Financial Institution Which Is Not a Party to a Franchise Agreement Is Nevertheless Automatically Subject to the Act.

It is undisputed that Ford Credit was not a party to the franchise agreement between Ford Motor and Colonial. It is likewise undisputed that Ford Credit was not being used by Ford Motor as an intermediary or buffer in order that Ford Motor might escape the reach of the Franchise Act. There was never any question that Ford Motor, the franchisor, was directly liable to Colonial for any failure to act in "good faith" with respect to its franchise agreement with Colonial. Indeed, the jury found Ford Motor to be liable to Colonial under the Franchise Act.

It is equally clear that the financial relationship between Ford Credit and Colonial was wholly independent of the franchise relationship between Ford Motor and Colonial. For a number of years, Colonial had a franchise relationship with Ford Motor but no financial relationship with Ford Credit. During that period, Colonial obtained its credit needs from competing financial institutions.

When Colonial and Ford Credit ultimately entered into a financial relationship, it was no different from any lender-borrower arrangement. It was entirely independent of Colonial's franchise agreement with Ford Motor. It was

the same sort of financial relationship that Colonial had previously had with other financial institutions.

In its original decision, the Tenth Circuit recognized the difference between a franchise relationship and a financial relationship. It held that because Ford Credit was not a party to the franchise agreement between Colonial and Ford Motor, the Franchise Act "on [its] face . . . was not applicable to Ford Credit." 577 F.2d at 108. (A. 4a-5a.)

On rehearing, however, the court focused exclusively on the fact that Ford Credit was a subsidiary of Ford Motor and ignored the far more important fact that Ford Credit was not a party to any franchise agreement. To be sure, the Tenth Circuit asserted that it was "unquestioned" that Ford Credit had a "contractual relationship" with Colonial. 592 F.2d at 1129 n. 4. (A. 21a n. 4.) But it is undisputed that that "contractual relationship" between Ford Credit and Colonial was a garden-variety, lender-borrower arrangement which existed apart from and wholly independent of the franchise relationship between Ford Motor and Colonial.

The Tenth Circuit's ruling on rehearing—that Ford Credit was subject to the Act as a matter of law, despite the fact that it was not a party to any franchise agreement—is in direct conflict with the prior decisions of three other courts of appeals. This consistent line of authority began with *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). In *York*, a dealer had sued Chrysler Corporation—an automobile manufacturer which was not a party to the dealer's franchise agreement—as well as Chrysler Motors—Chrysler Corporation's wholly owned subsidiary which had issued the franchise—under both the Sherman Act and the Franchise Act. In a complaint remarkably similar to the

complaint in this case, the dealer charged that the manufacturer had conspired with its subsidiary to coerce the dealer who had been selling vehicles "out of trust." *Id.* at 790.

The jury in *York* returned verdicts for both the manufacturer and its subsidiary on the antitrust claim, but against both under the Franchise Act. The Fifth Circuit upheld the verdict under the Franchise Act against Chrysler Motors but reversed the verdict against Chrysler Corporation on the ground that it was not a party to the franchise agreement. Although well aware that Chrysler Motors was the wholly owned subsidiary of Chrysler Corporation, the court of appeals found that the dealer had failed to prove that the two corporations were responsible for the acts of one another. *Id.* at 791. The Fifth Circuit held that, under the express terms of the Franchise Act,

> "only the one which has entered into a franchise agreement could be held accountable for performing or complying with it. Since Chrysler Corporation was not a party to the franchise and had no legal responsibility to plaintiffs for the acts of Chrysler Motors, which signed the franchise, it should have been dismissed from the suit and judgment should not have been entered against it." *Id.* at 791.

The Fifth Circuit's ruling in *York*—that one corporation's status as a wholly owned subsidiary of another does not make both corporations jointly liable under the Automobile Dealer's Franchise Act—has been followed in another case remarkably on point. In *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 824 (N.D. Ga. 1976), a dealer alleged that Chrysler Corporation (the merged successor of Chrysler Corporation and Chrysler Motors),

which had issued the franchise to the dealer, and its wholly owned subsidiary, Chrysler Realty, which had financed the dealer's facilities, had conspired in violation of the Franchise Act to force the dealer to purchase certain services from Chrysler Realty on the threat of losing its franchise from Chrysler Corporation. *Id.* at 830. On a motion to dismiss, the court held that Chrysler Realty could not be held under the Act because it was not a party to the franchise agreement. *Id.* at 831. The court rejected the plaintiff's contention—identical to Colonial's contention in this case—that a firm which was not a party to the franchise agreement could be held liable under the Franchise Act for the failure of its parent, the franchisor, to act in good faith in "terminating, cancelling, or not renewing the franchise." Following the Fifth Circuit's decision in *York,* the court held that

> "[a]n action under the [Franchise Act] must be predicated upon a written franchise agreement. An entity which is not a party to such an agreement, even if the entity is otherwise considered an 'automobile manufacturer,' is not within the Court's jurisdiction as established in section 1222." *Id.* at 831.

The court in *Westbrook* likewise followed *York* in rejecting the plaintiff's alternative contention—again identical to Colonial's alternative contention in this case—that the wholly owned subsidiary should have been held responsible for the acts of its parent. The court held that:

> "although Chrysler Realty is a wholly-owned subsidiary of Chrysler Corporation and the Board of Directors of Chrysler Realty report regularly to the Board of Directors of the Chrysler Corporation . . . the fact that a parent-subsidiary relationship exists between the

> Chrysler Corporation and Chrysler Realty is not dispositive of the agency issue in this situation . . . . As was true in *York Chrysler-Plymouth, Inc.*, plaintiffs have made no showing which would make Chrysler Realty responsible for the termination, cancellation, or failure to renew plaintiffs' franchise agreement by Chrysler Corporation." *Id.* at 832.

The Seventh and Ninth Circuits have agreed with the Fifth Circuit's holding in *York*. Both have held that a corporation, whatever its status as a parent or subsidiary, cannot be held liable under the Franchise Act if it is not a party to a franchise agreement, unless it is used by another corporation—the party to the franchise agreement—as an "alter ego" for the purpose of evading franchise responsibilities imposed upon automobile manufacturers by the Act. *Lawrence Chrysler Plymouth, Inc. v. Chrysler Corporation,* 461 F.2d 608, 613 (7th Cir. 1972); *Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59, 63-64 (9th Cir. 1973).

These consistent rulings were recently reviewed and confirmed by the Ninth Circuit in *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978), a decision rendered less than a month after the Tenth Circuit's original ruling in this case. In *Marquis,* a dealer had brought an action under the Franchise Act against a manufacturer and its wholly owned subsidiary which had issued the franchise to the dealer. The Ninth Circuit held that, as a general rule, "one not a party to the [franchise] agreement cannot be liable under the Act." *Id.* at 629. The court recognized a limited exception to this rule where "the party contracting with the dealer is the manufacturer's agent or merely a 'straw man' erected to insulate [the manufacturer] from statutory liability." *Id.* at 630. But the court of appeals found that even though the party that had signed the fran-

chise agreement was a wholly owned subsidiary of the manufacturer, "there was no evidence that [the subsidiary] was [the manufacturer's] agent in dealing with Marquis." *Id.* The subsidiary—the party to the franchise agreement—was held liable under the Franchise Act. The parent non-party was not.

Of course, Colonial did not allege or seek to prove that Ford Motor was a mere "straw man" under the control of Ford Credit. Nor did Colonial allege or seek to prove that Ford Motor was attempting to use the financing agreement between Colonial and Ford Credit as a means of escaping any of its own franchise obligations to Colonial. To the contrary, Ford Motor dealt directly with Colonial, signed a franchise agreement directly with Colonial, and in the proceedings below did not dispute that it was an "automobile manufacturer" within the meaning of the Act. Thus, under the rulings of the Fifth, Seventh and Ninth Circuits, Ford Motor—and not Ford Credit—is subject to the Franchise Act.

In this case, however, the Tenth Circuit held that even though Ford Motor is fully answerable under the Act with respect to its *franchise* agreement with Colonial, Ford Credit should also be held to the standards imposed by the Act with respect to its *financial* dealings with Colonial. Such an unwarranted extension of the Act conflicts not only with the decisions noted above; it also conflicts with the express terms and legislative history of the Franchise Act.

The preamble to the Act plainly states that it was intended

> "to balance the power now heavily weighted in favor of automobile manufacturers, by enabling franchise

> automobile dealers to bring suit . . . to recover damages sustained by reason of the failure of automobile manufacturers to act in good faith *in complying with the terms of franchises or in terminating or not renewing franchises with their dealers.*" 70 Stat. 1125, ch. 1038 (1956) (emphasis added).

The reports accompanying the Act likewise make it clear that Congress was concerned solely with what it perceived to be the unequal bargaining power of the automobile manufacturers and their dealers arising from the fact that the dealers were dependent for their very livelihoods on the *franchises* granted by the manufacturers:

> "Historically the automobile-dealer franchises have been drawn by the manufacturer in such a way as to give him maximum control over the operation and management of the dealer's business without assuming any obligation therefor. Because of his superior bargaining strength, the manufacturer, in negotiating with individual dealers, has been able to obtain agreements which, while bilateral in form, have been unilateral in fact. . . . These franchises, or selling agreements as characterized by the manufacturer, are not designed to create legal rights based upon reasonable expectations, as are most private contracts." S. Rep. No. 2073, 84th Cong., 2d Sess. 3 (1956).

In view of the unequal bargaining power between automobile manufacturers and their dealers, Congress believed it appropriate to hold the manufacturers to a standard of conduct more stringent than that imposed in normal commercial relationships. *See* S. Rep. No. 2073, 84th Cong., 2d Sess. 5. But it is equally clear that Congress did not

intend to extend such a stringent standard to relationships outside the core franchise agreement.

As originally introduced, the Senate bill would have required a manufacturer "to act in good faith in all dealings or transactions with [its] dealer." S. 3879, 84th Cong., 2d Sess. § 2 (1956). During the floor debate, however, this provision was eliminated. As a result, the Act only requires a manufacturer

> "to act in good faith in performing or complying with any of the terms or provisions of the *franchise*, or in terminating, cancelling, or not renewing the *franchise* with said dealer. . . ." 15 U.S.C. § 1222 (emphasis added).

It is thus clear that the Act "is not designed to apply to the entire relationship between the manufacturer and the dealer, but only to that part of their relationship governed by the written franchise." Note, *Statutory Regulation of Manufacturer-Dealer Relationships in the Automobile Industry,* 70 Harv. L. Rev. 1239, 1246-47 (1957) (footnote omitted).

This limitation on the scope of the Franchise Act was quite reasonable. Congress perceived that while a dealer may be dependent on his manufacturer for the basic provisions of the franchise—most notably, the manufacturer's automobiles and trademark—no such dependency exists with respect to nonfrancise goods or services, such as financing. As the facts of this case demonstrate, a dealer has many alternative sources of financing and can easily operate without any credit whatsoever from the manufacturer or its subsidiary. Here Colonial obtained its financing for years from others.

It is thus inappropriate to impose the Act's franchisor standards upon a manufacturer's financing subsidiary (or, for that matter, upon any other financial institution). Certainly Congress never intended any such result. Despite the fact that financing subsidiaries of automobile manufacturers were well-known in 1956 when the Act was passed, there is not one word in the Act's legislative history suggesting that Congress intended that when such a subsidiary entered into a standard credit arrangement with a dealer, the subsidiary's conduct should be held to the standards imposed by the Act on the manufacturer's franchise conduct.

The impropriety of holding financial subsidiaries of automobile manufacturers to franchisor standards is all the more apparent in light of the regulation that Congress has imposed generally upon financial institutions. Congress has not imposed even the far less stringent disclosure obligations of the Truth-in-Lending Act on financial institutions in their dealings with such commercial accounts. 15 U.S.C. § 1603(1) (1976). It would be absurd to hold that Congress—without the slightest mention—intended the Franchise Act to impose franchisor standards upon the financing subsidiaries of automobile manufacturers in their financial relations with dealers; but that all rival financial institutions would be free of such standards. Yet that is precisely what the Tenth Circuit has held.

The anticompetitive effect of the Tenth Circuit's holding is clear. If it stands, financial, realty, and other subsidiaries of automobile manufacturers are likely to encounter extensive litigation in the federal courts, as dealers seek to hold them to standards suited to a franchise relationship, but unsuited to other commercial relationships. Unaffiliated competitors will, of course, remain free of any such ex-

posure. Where there has been no attempt by the manufacturer to evade its franchise responsibilities, such a discriminatory extension of the Franchise Act is unwarranted.

II.

The Tenth Circuit's Erroneous Interpretation of the "Control" Provisions of the Act Conflicts With Its Legislative History and Constitutes a Denial of Due Process.

As we have demonstrated, the absence of a franchise agreement between Ford Credit and Colonial is dispositive of Colonial's claims against Ford Credit under the Act and mandates reversal. But wholly apart from the franchise issue, we submit that the Tenth Circuit erred by misapplying the "control" provisions of the Franchise Act. In holding that a wholly owned subsidiary of an automobile manufacturer must be irrebuttably presumed to be "under the control of [the] manufacturer . . . in connection with the distribution of . . . vehicles," the court below adopted a rule that ignores the legislative history of these "control" provisions and contravenes fundamental principles of due process of law.

A. *The "Control" Provisions of the Act Were Intended To Impose Liability Only upon a Factual Determination that the Automobile Manufacturer Was Acting Through Another Firm in Connection With the Distribution of Automobiles*

The court of appeals below has established a *per se* rule that a financing subsidiary of an automobile manufacturer which extends credit to a dealer automatically satisfies the two-part test of Section 1(a) of the Act; that is, the subsidiary is conclusively presumed to be a person who "[1] acts for and is under the control of such manufac-

turer . . . [2] in connection with the distribution of . . . vehicles." 15 U.S.C. § 1221(a) (1976). The court's holding conflicts with both the express terms and legislative history of the Act.

Congress adopted Section 1(a) of the Act to prevent a manufacturer from "escaping the consequences of [the Act] by establishing a sales corporation which would enter into franchise agreements with dealers." H.R. Rep. No. 2850, 84th Cong., 2d Sess. 27 (1956).[2] At the same time, however, Congress was concerned that the statute should not cast the net of liability too broadly; an automobile manufacturer should only be held liable for its own acts or for those of persons under its control who were acting for it in connection with its distribution of automobiles.

When first introduced in the Senate, the proposed Act defined an automobile manufacturer to include a "person . . . which acts for such manufacturer . . . in connection with the distribution of . . . vehicles." S. 3879, 84th Cong., 2d Sess. 1-2 (1956). The breadth of this definition was assailed by the Antitrust Division of the Department of Justice because it made a manufacturer liable not only for its own misconduct, "but also, for instance, [that of] his distributors, whether or not they are subject to his control." *Automobile Dealer Franchises: Hearings Before the Subcomm. on Antitrust of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. 128 (1956) ("House Hearings"). *See also* 102 Cong. Rec. 9524 (June 1956). In response to this criticism, the sponsors of the bill amended the original definition by adding the requirement that before a person

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[2] *See also Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59, 64 (9th Cir. 1973); *Volkswagen Interamericana, S.A. v. Rohlson*, 360 F.2d 437, 441 (1st Cir. 1966); *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172, 175 (S.D. Cal. 1959).

could be held liable under the Act, it would have to be demonstrated that he had been acting *"under the control"* of an automobile manufacturer. House Hearings, *supra*, at 17 (emphasis added).

Heretofore the courts have been sensitive to the congressional limitations intended by the "control" requirements of the Act. They have properly treated questions of "control" and "in connection with the distribution of . . . vehicles" as factual issues, to be decided by the trier of fact in each case upon the evidence presented.

Kibsgard Sports Car Center, Inc. v. Great Lakes Car Distributors, Inc., 1973-1 Trade Cas. (CCH) ¶ 74,568 (6th Cir. 1973), *rev'g*, 1973-1 Trade Cas. (CCH) ¶ 74,566 (N.D. Ohio 1972), is illustrative. There the district court had granted summary judgment for the defendant, an automobile distributor, after concluding that it was not the instrumentality of the manufacturer whose vehicles it distributed. The Sixth Circuit reversed, holding that since the question of control was a factual one, summary judgment was inappropriate.

Similarly, in *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 824 (N.D. Ga. 1976), the court refused to infer a control relationship from the mere fact that one corporation was the wholly owned subsidiary of another. Rather, the court looked to the "facts" which indicated that the two were "separate legal entities each operating in its own sphere." *Id.* at 832.

In *Grappone, Inc. v. Subaru of America, Inc.*, 403 F. Supp. 123, 137 (D.N.H. 1975), the court likewise concluded, "[a]fter a close examination of the facts," that the manufacturer's control over a defendant-distributor was insufficient to warrant a finding that the distributor was an auto-

mobile manufacturer pursuant to Section 1(a) of the Act. The court likewise recognized that the second part of the statutory test—control "in connection with the distribution of vehicles"—presented a factual question:

> "In resolving the issue of control, courts should look to the relationship between the manufacturer and the dealer and ask whether the *manufacturer* is using the distribution chain as a means of imposing its will on the *dealer*. . . . But the fact that [a] [m]anufacturer exerts control over a portion of [a distributor's] business is not dispositive of the issue; the control must be over [the distributor's] relationship *vis-a-vis the retail dealers*." *Id.* at 135-36 (emphasis in original).

In the instant case, the Tenth Circuit ignored the congressional concern about "control . . . in connection with the distribution of . . . vehicles" and the unbroken line of cases holding that these requirements present factual questions which must be decided according to the circumstances of each case. Rather, the court below conclusively presumed "control . . . in connection with the distribution of . . . vehicles" solely because Ford Credit is a wholly owned subsidiary of Ford Motor. In so doing, the court ignored the evidence before the jury—including a stipulated statement of the corporate policy of Ford Motor and Ford Credit, based upon an antitrust consent decree, barring Ford Motor from "making available or denying or threatening to deny any dealer any service or facility," for the purpose of influencing the dealer to take financing from Ford Credit. *See United States v. Ford Motor Co.*, 1952-53 Trade Cas. (CCH) ¶ 67,437 at 68,198 (N.D. Ind. 1953). That decree further prohibits Ford Motor from terminating or threatening to terminate any dealer who fails to

patronize Ford Credit. *Id.* The decree thus effectively separates Ford Motor's automobile business from Ford Credit's lending business.

On the basis of this and other evidence, the jury concluded that Ford Motor and Ford Credit had not conspired with one another in violation of the antitrust laws and that Ford Credit was not liable under the Franchise Act. This evidence was swept aside by the Tenth Circuit, without comment or refutation, when it conclusively presumed that Ford Motor controlled Ford Credit in connection with the distribution of automobiles, solely on the basis of the parent-subsidiary relationship.

The "control" limitation was added to the Act precisely to prevent such a result.

B. *The Decision of the Court of Appeals Contravenes Fundamental Principles of Due Process of Law*

This Court has long held that the application of an arbitrary irrebuttable presumption violates the Due Process Clause. Thus, presumptions imposed by statute are valid only if there is a rational connection between the facts proved and the ultimate fact presumed. *Manley v. Georgia,* 279 U.S. 1, 5-6 (1929). By determining that, as a matter of law, a wholly owned financing subsidiary of an automobile manufacturer must have operated under the manufacturer's control in connection with the distribution of vehicles, the court below has adopted an irrebuttable presumption that contravenes these basic due process principles. As we have demonstrated above, there is no basis for concluding that Congress imposed these presumptions through the Act. Consequently, the court of appeals ignored this Court's strict standards for valid presumptions, and, in effect, created an arbitrary presumption by fiat.

In *Heiner v. Donnan*, 285 U.S. 312 (1932), this Court invalidated a federal taxation measure which imposed the irrebuttable presumption that gifts made within two years of the donor's death were subject to a federal estate tax because they were made in contemplation of death. The Court explained that "a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause . . . ." *Id.* at 329. More recently this principle was reaffirmed when this Court stated: "Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973).

The doctrinal basis for these rulings was explained in *Mobile, Jackson & K.C. Ry. v. Turnipseed*, 219 U.S. 35, 43 (1910):

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law . . . it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. *So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.*" (Emphasis added.)

In the instant case, the court of appeals barred Ford Credit from establishing a factual defense on the "control" issue; indeed, it overturned a jury finding that Ford Credit had established that defense under the Act. More-

over, in disregarding Ford Credit's separate corporate identity, the court of appeals ignored the contrary teachings of this Court and a number of courts of appeals.[3]

This is not a case in which a court has examined and approved as rationally based a presumption imposed by Congress in a statute. To the contrary, in this case the court of appeals has both created and approved an irrebuttable presumption which the Congress surely did not intend. The court of appeals has ignored this Court's admonitions that while "[p]rocedure by presumption is always cheaper and easier than individualized determination," *Stanley v. Illinois,* 405 U.S. 645, 656-57 (1972), convenience alone cannot justify the preclusion of " 'a party from adducing evidence which, if received, would compel a decision in his favor . . . .' " *United States v. Provident Trust Co.,* 291 U.S. 272, 282 (1934).

CONCLUSION

The Automobile Dealer's Franchise Act has been in effect for twenty-three years. Heretofore, it has been applied, as Congress intended, to the franchise relationships between manufacturers and dealers. The Tenth Circuit's decision extends the Franchise Act in a discriminatory and anticompetitive fashion to financial relationships between borrowers and certain lenders, and denies those lenders any jury trial on a key element of statutory liability. Con-

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[3] *See NLRB v. Deena Artware, Inc.,* 361 U.S. 398, 403-04 (1960); *Peterson v. Chicago Rock Island & Pacific Ry.,* 205 U.S. 364, 391 1907); *Williams v. McAllister Bros., Inc.,* 534 F.2d 19, 21 (2d Cir. 1976); *Berger v. Columbia Broadcasting System,* 453 F.2d 991, 994 (5th Cir. 1972).

gress intended no such result. For these and the other reasons stated, a Writ of Certiorari should issue to review the judgment of the Tenth Circuit.

Respectfully submitted,

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June 5, 1979

Appendices

Appendix A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 76-2079, 76-2080 and 76-2083.

COLONIAL FORD, INC., a Utah Corporation,

Plaintiff-Appellee,
Cross-Appellant,

v.

FORD MOTOR COMPANY, a Delaware Corporation,

Defendant-Appellant,

and

FORD MOTOR CREDIT COMPANY, a Delaware Corporation,

Defendant-Appellant,
Cross-Appellee.

Argued March 17, 1978.

Decided May 31, 1978.

Peter W. Billings, Jr., Salt Lake City, Utah (Peter W. Billings, Stanford B. Owen, Ted D. Smith, Fabian & Clendenin, Salt Lake City, Utah, with him on brief), for defendant, appellant, Ford Motor Company.

Harold G. Christensen, Salt Lake City, Utah (R. Brent Stephens, Snow, Christensen & Martineau, Salt Lake City, Utah, and George V. Burbach, Dearborn, Mich., of counsel, with him on brief), for defendant, appellant, cross-appellee, Ford Motor Credit Company.

Daniel L. Berman, Salt Lake City, Utah (Richard W. Giauque, and Gordon Strachan, of Berman & Giauque, Salt Lake City, Utah, with him on brief), for plaintiff, appellee, cross-appellant, Colonial Ford, Inc.

Before SETH, Chief Judge, and DOYLE and MCKAY, Circuit Judges.

SETH, Chief Judge.

Colonial Ford, Inc. brought this action against Ford Motor Company and Ford Motor Credit Company. There were several causes of action alleged in the complaint; however, only two were submitted to the jury. These were a cause under Section 1 of the Sherman Act, and the second was under the Automobile Dealer Franchise Act, 15 U.S.C. § 1221.

The plaintiff corporation had been a Ford dealer in Utah, and during most of the time here concerned, it was owned by LeGrande Belnap, as the principal owner, and by Marshall Pease who had a contract to buy a forty-nine percent interest from Mr. Belnap.

The defendant, Ford Motor Credit Company, is a wholly-owned subsidiary of Ford Motor Company, and provides financing to Ford dealers for cars and real estate. It also provides financing to a much lesser extent for undertakings not related to the automobile business. It had provided the financing for cars purchased by Colonial from Ford Motor, the floor planning, and financed the building of a new facility for Colonial, taking back a deed of trust on the real estate. The defendant Ford Motor Credit counterclaimed to recover the amounts asserted to be due from Colonial on the floor-plan agreement, together with related accounts, and to accelerate the amounts due under the real estate loan because of Colonial's failure to pay installments.

The trial court, before trial, issued an injunction against both defendants to prevent (1) a foreclosure under Ford Credit's deed of trust; (2) repossession of the floor-planned cars, and (3) to require the continuation of the previous floor-plan credit arrangement to provide for the purchase of cars from Ford Motor during the litigation.

The two causes of action were submitted to the jury, and the jury found for Colonial Ford against Ford Motor Company, only, on the Automobile Dealer Franchise Act claim in the amount of $210,000.00. The jury found for the defendant Ford Credit on the Dealer Act claim against it, and for both defendants on the Sherman Act cause. The jury also answered several special interrogatories.

Shortly after trial the court terminated the injunction as to the floor-planned cars in Colonial's possession, and permitted Ford Credit to repossess the new and used car inventory. The court also authorized Ford Credit to stop floor-plan financing which had been continued under the injunction. The injunction was however continued to prevent Ford Credit from foreclosing on its deed of trust, and also from executing on its judgment of $2,897,125.22 for balances due from Colonial entered on its counterclaim.

All parties have appealed. The plaintiff's points on appeal relate to the Automobile Dealer Franchise Act cause of action, and to the real estate acceleration issue. Thus Colonial urges:

1. There was coercion by Ford Motor under the Dealer Act.

2. The coercion caused Colonial to have liquidity problems and a lack of working capital.

3. Ford Credit is subject to the Dealer Act as a matter of law, and such issue should not have been submitted to the jury.

4. The instructions were erroneous as to the application of the Dealer Act to Ford Credit.

5. The trial court erroneously determined that there was no waiver by Ford Credit of the acceleration provisions of the real estate financing agreement.

Ford Motor Company urges in its appeal that the court's interpretation of the Dealer Act and instructions given the jury on the Act were erroneous especially as they concerned good faith and "wrongful demands." It also argues that the jury should not have been permitted to consider the acts of Ford Credit in the application of the Dealer Act to Ford Motor. Ford Motor also urges that there was no valid evidence of damages.

Ford Credit argues that it was error to continue the injunction preventing foreclosure pending appeal.

As mentioned above, the plaintiff urges that the Automobile Dealer Franchise Act, 15 U.S.C. § 1221, was applicable to Ford Motor Credit Company as a matter of law. This argument is centered on the fact that Ford Credit is a wholly-owned subsidiary of Ford Motor, and was floorplanning the cars purchased by plaintiff Colonial from Ford Motor.

The Dealer Act is directed to manufacturers, to assemblers, and to distributors of automobiles. It is further directed to the performance or termination of the franchise agreement between those so engaged and the dealers.

It is apparent from the record that Ford Credit is not a manufacturer, assembler, or distributor, and further that it had no franchise agreement with plaintiff. Thus on the

face of the Act, it was not applicable to Ford Credit. *See Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59 (9th Cir.); *Lawrence Chrysler Plymouth, Inc. v. Chrysler Corp.*, 461 F.2d 608 (7th Cir.); *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir.). The Act also includes any other entity " . . . which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles." 15 U.S.C. § 1221(a). The "acts for" or "under the control" provisions must relate to the transactions or circumstances out of which the cause of action arose. Testimony and evidence must develop these factors in each case, and the "control" must be shown to be in connection with the "distribution" of automobiles. Referring to these elements of the statute as "control," it is apparent under the Act that the development during trial is directed to actual and to practical considerations there existing. This must be the description of a fact question in ordinary circumstances, and was such a matter here. The examination of several witnesses was directed to this issue, and especially in the questioning of the official of Ford Credit who made the decision to terminate the floor planning, Mr. Thomas. The "under control" and "acts for" elements here created a fact issue for submission to the jury. The wholly-owned subsidiary aspect was certainly a factor or an opportunity, but in the abstract it could not be a determining factor. The plaintiff centers on the financing of cars purchased from Ford Motor as part of distribution, but this is not persuasive as this position was shown to be no different from that occupied by the local bank which had previously floor-planned for plaintiff.

We find no error in the instructions given to the jury on the Dealer Act application to Ford Credit. The statutory elements were covered in the instructions, and contrary

to plaintiff's arguments the acts must be directed to the franchise as above pointed out. This was covered by the instructions and necessarily related to the parties to the franchise agreement.

The fact question was thus properly submitted to the jury, and it decided it. In answer to special interrogatories, the jury responded that Ford Credit had not failed to act in good faith in its business relations with Colonial under the Act. Also it replied that the acts of Ford Credit did not prevent or make it more difficult for Colonial to meet its financial obligations to Ford Credit.

We thus find no error in the submission of the Dealer Act question as to Ford Credit to the jury, and the verdict must stand.

The plaintiff, in reference to the real estate financing, urges that the trial court should not have applied the acceleration provisions of the deed of trust and security agreement. This financing was by Ford Credit, and it is undisputed that installments were not paid by plaintiff when due in the period September 1974 until September 1975, and there was about $130,000.00 past due. In May 1975, Ford Credit sent a notice to plaintiff exercising its right to accelerate under the deed of trust and security agreement. The same month the trial court entered a temporary restraining order, followed by an injunction which required continuance of the financing as it existed before the termination of floor-planning, which required that Ford Credit take no action to foreclose or repossess, and generally required Ford Credit to carry out its previous financial relationship with plaintiff; thus to continue to extend credit. While this injunction was in effect, plaintiff made some installment payments on the real estate. The trial court stated that the acceptance of such payments, without any satisfaction by plaintiff of the older obligations, did not

establish ". . . a factual premise for the acceptance of waiver claimed by plaintiff." It would seem sufficient to observe that the injunction altered significantly the relationship and obligations of the parties under the deed of trust and the security agreement, and that the trial court could determine the impact of its injunction and his intent in its issuance as to the waiver issue. Thus the trial court's interpretation of the injunction as to this issue must be accepted and is accepted. The matter was then clearly outside normal business relations and outside the voluntary elements of such relations. We find nothing in *United States v. Colombine Coal Co.*, 27 Utah 2d 140, 493 P.2d 983 (Utah), or in *Swain v. Salt Lake Real Estate & Investment Co.*, 3 Utah 2d 121, 279 P.2d 709, to lead to a contrary conclusion.

The order or injunction of the trial court preventing foreclosure by Ford Credit under the deed of trust and preventing execution under its judgment is hereby set aside.

Ford Motor Company in this appeal urges that the trial court misconstrued the Automobile Dealer Franchise Act (15 U.S.C. § 1221), and failed to give certain instructions to the jury and also gave instructions which were erroneous. Ford Motor in this argument asserts that there must be a wrongful demand on the dealer coupled with a threat of reprisal related to the franchise.

Ford Motor first urges that there was no written "franchise" and Colonial was not a "dealer" until September 2, 1969. Thus acts of Ford Motor before that time cannot be a violation of the Dealer Act. However, it is apparent that several of the most significant requirements imposed by Ford Motor as conditions to be met before a franchise would be given were made before that date. It is a sufficient answer that these conditions were carried over into the formal dealership period. Two examples are the require-

ment that Mr. Pease be given a contract to buy into the dealership when created to the extent of forty-nine percent, and that the place of business be changed to a new location with new facilities. Ford Motor in its brief even refers to the relocation as "an inducement to being granted a franchise." Ford Motor also treats the relocation matter as "contractual."

It is clear from the record that Ford Motor required Mr. Belnap to agree to sell Mr. Pease a forty-nine percent interest in the Colonial corporation. This condition or requirement carried over into most of the pertinent period.

There were other incidents which were supported by some evidence and submitted to the jury as part of plaintiff's case to show a violation of the Dealer Act.

As indicated above, Ford Motor urges that the instructions were incomplete and erroneous as to the proof required to prove a violation of the Act. We cannot describe or analyze all the instructions here. Considering the instructions as a whole, as we must, the trial judge properly instructed on "coercion," "intimidation," and "good faith." It instructed that "good faith" was to " . . . be determined in a context of actual or threatened coercion or intimidation." *See Hanley v. Chrysler Motors Corp.*, 433 F.2d 708 (10th Cir.). Also, if Ford " . . . through a series of acts, deprived [plaintiff dealer] of the right as an independent businessman to control its own business to serve [Ford Motor's] own economic interest and in disregard of [the dealer's] interest, . . . " a violation of the Act could result. The court against this set out Ford Motor's right under the Act to "urge," "argue," "explain," "endorse," "recommend," and "persuade." The court also instructed that Ford Motor " . . . may reasonably be concerned with the management, facilities, finances and inventory of its dealers, . . . may require a dealer to adhere to reasonable standards in these

areas of the dealer's operations." The instructions that Ford Motor could "require" the dealer to follow reasonable standards as to facilities and finances are clear, and correctly submitted this aspect to the jury. The court did not use the "wrongful demand"—"coercion" coupling Ford Motor urges, but this was not required to be separately treated in those words. Also we find no error in the use in the instructions of such terms as "arbitrarily," "unreasonably," or "oppressive."

We, of course, held in *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (10th Cir.), that mere arbitrariness of an automobile manufacturer does not constitute a violation. The instructions before us do not constitute such a submission to the jury. *See also Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.).

We find no error in the instructions, and hold that the issues were properly submitted to the jury.

To consider only one of several elements presented to the jury, that is, the requirement that Mr. Pease be given a right to buy in the dealership, we must hold that there was sufficient evidence upon which the jury could base its verdict, having been properly instructed. It appears that Mr. Pease was placed on the scene by Ford Motor, and then inserted into the enterprise as a condition to the granting of a franchise. The Dealer Policy Board deferred action on the franchise application until Mr. Pease was given the buy-in agreement, and instructed the local representative of this. This was the period May to September 1969. There was testimony that Ford Motor wanted Mr. Pease to have "full control."

Under the buy-in agreement, Mr. Pease apparently paid $20,000.00 down, and the balance of the large sum required to pay for the forty-nine percent interest was to come from profits from the dealership. It appears that the initial pay-

ment was withdrawn by him, although the record is not entirely clear. In any event, the jury could well infer that Mr. Pease was given a free ride in the acquisition of a forty-nine percent interest in a large dealership, all as a condition to granting the franchise. Mr. Pease was not in a position to provide additional capital for Colonial which Ford Motor found to be necessary. Thus the corporation could only look to the fifty-one percent interest owner for more capital contribution. The insertion of Mr. Pease thus created this fundamental corporate problem related to capital requirements. Mr. Pease and Mr. Belnap *both* had full managerial authority and responsibility under the franchise, both were told in mid-1974 of the need for additional capital. The buy-in agreement between Mr. Belnap and Mr. Pease provided that Mr. Pease would discharge his managerial duties in a manner acceptable to Ford Motor. There was testimony that the buy-in agreement was intended to provide Mr. Pease with control over the operation of the agency. Mr. Belnap in October 1974 negotiated Mr. Pease out of the agency, but at a time when the several problems had become so serious that the agency was failing.

Thus again, there was sufficient evidence that the requirements made by Ford Motor or conditions to granting the franchise had a direct consequence on the liquidity of the dealership. This in turn provided a basis for the damage award. Ford Motor urges that the damages were derived only from the cutoff of floor planning, but we find no support for this position. There was evidence of change in profits and volume which was adequate evidence.

The Automobile Dealer Franchise Act, 15 U.S.C. §§ 1221-1225, in section 1223 provides for a three-year limitation period. Three years before the date of filing the action would be May 15, 1972. *See* our opinion in *Hanley v. Chrysler Motors Corp.*, 433 F.2d 708 (10th Cir.), decided in 1970.

The plaintiff argues that the limitation issue is controlled by *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77, decided in 1971. The *Zenith* case was an antitrust case under section 4 of the Clayton Act, with a four-year limitation period. Ford Motor argues that *Zenith* is not applicable to this type of case, and in any event, that any prelimitation incidents were brought with the *Zenith* exceptions by the plaintiff and refers particularly to the Belnap-Pease buy-in agreement. Ford Motor in its brief states:

> "Thus even assuming that Colonial ever had a claim for the alleged transfer of control from Belnap to Pease, the last alleged act of Ford was to force the signing of the Belnap-Pease agreement. The execution of that agreement was 'by its nature permanent at initiation without further acts.'"

The parties cite *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir.); *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768 (3d Cir.); and *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir.).

The control-liquidity problems were developed in the record. There was testimony as to several reasons why the problem arose in the dealership which are not mentioned in this opinion, but upon which the jury could well have based its verdict. There was evidence sufficient to establish, for the jury, a causal connection between the size or cost of the new location and facilities, and the problem; and similarly the testimony as to inventories, parts, flooring expense as related to inventory, and others. The liquidity problem existed, and was at its worst in the 1972-1974 pe-

riod. As indicated Ford Motor complained about the problem to plaintiff several times during the first half of 1974.

We see no reason why the doctrine announced in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 725, 28 L.Ed.2d 77, as to the period of limitations, should not be here applied. The acts of the manufacturer sought to be reached under the Automobile Dealer Franchise Act, 15 U.S.C. § 1221, are so comparable to the acts condemned in the antitrust treble damage statutes that the same considerations should be used in the application of the limitation provisions. It is apparent that the Court in *Zenith* was speaking only to the antitrust action when it expressed the basic accrual of a cause of action, and availability of proof connection upon which the decision was based. Thus the Court said:

> "In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted."

The proof of damage problem as to the liquidity-management claims obviously was the same as in *Zenith*.

The courts in cases following closely in time the *Zenith* decision have said as in *Continental-Wirt Electronics Corp. v. Lancaster Glass Corp.*, 459 F.2d 768 (3d Cir.), an antitrust action:

> " . . . However, if the district court should find that some portion of Waterman's damages were too speculative to be ascertainable at the time the overt act which

> produced them occurred, then those damages which become ascertainable within the four years prior to the filing of the complaint will be recoverable."

Also in *Ansul Co. v. Uniroyal, Inc.*, 448 F.2d 872 (2d Cir.), which was a patent case with a claim by dealers that the patent could not be enforced because of patent misuse through antitrust violations, the court said:

> "For these reasons we hold that Louisville [a dealer] is entitled to recover threefold those damages for the period beginning on May 31, 1964 which could not be proved with reasonable certainty in late 1963 [the date of termination of the distributorship]."

A similar statement appears in *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117 (5th Cir.), an antitrust action, where the court said:

> "The authorities cited above establish that continuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action."

The court continued and said in substance that a "newly accruing claim for damages" requires an act occurring within the period.

Thus we must hold that the pre-limitation period acts such as the relocation requirement and the Pease requirement, and others, were of such a nature that damages could not have been ascertained until an extended period of time had elapsed. The event which initiated the conditions, that is, the signing of the buy-in agreement or the agreement to the location change requirement, of course, took place at a fixed day and time of day, but the consequences in terms of ascertainable or probable damages under *Zenith* did not

give rise to a cause of action until much later, and within the three-year period. Thus the "action for damages" accrued within the limitation period expressed in the Dealer Act.

The judgment of the trial court is in all respects

AFFIRMED.

McKAY, Circuit Judge, concurring in part, dissenting in part:

I concur in the opinion of the court on all issues except one. I disagree with its conclusion that there was sufficient factual evidence to support the jury's determination that Ford Motor Credit Company was not subject to the Automobile Dealer Franchise Act under the circumstances of this case. The Act covers automobile manufacturers, assemblers and any other entity "which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles." 15 U.S.C. § 1221 (1976). First, in light of the broad remedial purposes of the Act, it is my view that the element of "control" is conclusively established by the showing that Ford Credit is a wholly owned subsidiary of Ford Motor. Second, with the facts presented in this case, Ford Credit's involvement is shown to be exclusively for the purpose of facilitating the distribution of automobiles manufactured by its parent manufacturer and assembler. I do not believe there was any evidence to support a contrary determination by the jury with or without proper instructions.

Appendix B

Opinion of the Court of Appeals Upon Rehearing

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 76-2079, 76-2080 and 76-2083.

Feb. 5, 1979.

Rehearing Denied March 1, 1979.

COLONIAL FORD, INC., a Utah Corporation,

Plaintiff-Appellee, Cross-Appellant,

v.

FORD MOTOR COMPANY, a Delaware Corporation,

Defendant-Appellant,

and

FORD MOTOR CREDIT COMPANY, a Delaware Corporation,

Defendant-Appellant, Cross-Appellee.

Peter W. Billings, Stanford B. Owen and Peter W. Billings, Jr., of Fabian & Clendenin, Salt Lake City, Utah, for defendant-appellant Ford Motor Co.

Harold G. Christensen and R. Brent Stephens, of Snow, Christensen & Martineau, Salt Lake City, Utah, and George V. Burbach, Dearborn, Mich., for defendant-appellant and cross-appellee, Ford Motor Credit Co.

Daniel L. Berman, Richard W. Giauque and Gordon Strachan, of Berman & Giauque, Salt Lake City, Utah, for plaintiff-appellee and cross-appellant Colonial Ford, Inc.

Before SETH, Chief Judge, and DOYLE and MCKAY, Circuit Judges.

MCKAY, Circuit Judge.

We have granted Ford Motor Company's petition for rehearing because we may have understated a significant element of the case. While we believe some clarification of our prior opinion[1] is in order, except as clarified herein our prior opinion with respect to the dispute between Ford Motor Company and Colonial is reaffirmed. We also have granted Colonial Ford, Inc.'s petition for rehearing. We conclude that a new trial should be granted with reference to the issue of whether Ford Motor Credit Company is liable to Colonial for acts allegedly done in violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976).

FORD MOTOR COMPANY PETITION FOR REHEARING

In our original opinion, reported at 577 F.2d 106, we pointed out that Ford Motor insisted that Marshall Pease be given the right to acquire a forty-nine percent interest in the automobile dealership. The record also shows that Ford demanded as a condition to the franchise that Pease be given absolute control of the enterprise. This position was asserted in meetings between Robert Parr of Ford and LeGrande Belnap of the dealership. Ford's Dealer Policy Board took the status of the franchise under advise-

[1] *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106 (10th Cir. 1978).

ment pending a resolution of these ownership and control issues. Belnap, who had by this time acquired a large investment in the enterprise, was under significant pressure to have the franchise issue resolved. The Board nonetheless deferred action on the franchise until all conditions and demands were complied with, including the requirement that "Marshall Pease [be] given a buy-in by Belnap." It appears that on July 9th, Parr advised Belnap that Ford Motor required for reinstatement of the franchise that Pease be given control of the dealership and a forty-nine percent buy-in that was to be paid from profits. Although Belnap strongly opposed the buy-in requirement, to protect his investment, he ultimately had to agree. The record shows that Pease paid $20,000.00 down on the buy-in contract and thereafter withdrew this amount from the dealership. Ford Motor's absolute requirement meant that Pease received a free ride to a forty-nine percent interest in a large dealership—which interest, of course, reduced Belnap's ownership share. Ford Motor would have us attach no consequence to Belnap's loss. In its petition for rehearing, Ford states: "There is no reason why the reduction of Belnap's stock ownership from 100% to 51% prevented him from providing additional working capital." We are not persuaded.

The dealership control arrangement was not a "management" aspect of the dealership in which Ford would have a legitimate interest, but instead was a requirement for the transfer of "ownership" to a particularly favored person. It is obvious that the position would be more attractive to a manager with ownership, but the matters are nevertheless separate. The record does not indicate the exact reason why Pease was to be placed in such a position, but it is clear that it was entirely the idea of Ford

Motor and was resisted by Belnap until it became impossible to continue opposition.

Ford Motor takes the position that these events happened before a new franchise was issued. It is true these events occurred during the dealership's operation in the hiatus between Ford's notice of franchise termination to Petty Ford, Inc.—the dealership Belnap had acquired—and Belnap's formally executing his franchise agreement with Ford. Ford contends that this chronological circumstance makes the Pease buy-in a matter of "contract," and that, as a result, Ford could use the franchise to enforce everything which had gone on before. Ford apparently would consider irrelevant the pressures and coercion applied prior to formal execution of the "new" franchise: all became regularized by the franchise; all became purified as "contractual."

We cannot agree that the timing of franchises can be so manipulated to regularize improper and coercive demands and to avoid the consequences of the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976). These pre-franchise events described above necessarily became involved in the franchise, and the Act was violated by Ford's demands for what it blandly described as "contractual performance." The bad faith of Ford Motor Company thus carried over into the franchise and permeated the entire relationship.

Colonial Ford's Petition for Rehearing

Ford Motor Credit is a wholly owned subsidiary of Ford Motor Company. Its primary business is financing the distribution of Ford automobiles by providing Ford dealers with capital. Approximately 90 percent of its multi-billion dollar financing was in this enterprise; the remaining 10 percent was invested in nonautomative loans. It is

the conduct of Ford Motor Credit in providing financing to Colonial which forms the basis of the complaint against the financing subsidiary in this case. The particular issue before us on rehearing is whether Ford Motor Credit is subject to the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-1225 (1976). The Act authorizes federal court actions by automobile dealers for bad faith acts by automobile manufacturers. An "automobile manufacturer" is defined to include "any person, partnership, or corporation which acts for and is under the control of such manufacturer . . . in connection with the distribution of . . . automotive vehicles." 15 U.S.C. § 1221(a). We must determine whether Ford Motor Credit comes within the scope of this inclusive definition.

The trial court submitted the question of the Act's applicability to the jury with an instruction which in effect made "control" depend on specific overt acts in the actual transactions with Colonial. Colonial argues that a wholly owned subsidiary which acts for a manufacturer in connection with distribution of automobiles is subject to the Act as a matter of law and that the jury should have been so instructed. We agree.[2] In light of the broad remedial purposes of the Act, the element of "control" is conclusively established by a showing that Ford Motor Credit was a wholly owned subsidiary of Ford Motor and that its in-

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[2] The only question for the jury under the Act was whether Ford Motor Credit conducted itself in good faith in its relationship with Colonial. While the good faith issue was submitted to the jury in the trial below, it was submitted by means of a special interrogatory which permitted the jury to reach a conclusion based either on whether good faith actually existed or on whether the Act applied at all. The interrogatory read:

> State whether the defendant Ford Motor Credit Company failed to act in good faith in its business relations with Colonial Ford, in violation of the Dealer Day in Court Act.

Brief of Ford Motor Credit Co., at 3.

volvement with Colonial was exclusively for the purpose of facilitating the distribution of automobiles manufactured by its parent.[3]

The Act is designed to curtail the kinds of coercion and intimidation of retail dealers by manufacturers made possible by the parties' relative economic inequality. *Woodard v. General Motors Corp.*, 298 F.2d 121, 127 (5th Cir.), *cert. denied*, 369 U.S. 887, 82 S.Ct. 1161, 8 L.Ed.2d 288 (1962); *DeCantis v. Mid-Atlantic Toyota Distributors, Inc.*, 371 F.Supp. 1238, 1241 (E.D.Va. 1974). The most obvious point of leverage in the manufacturer-dealer relationship is financing. When, as in this case, a manufacturer uses a wholly owned subsidiary to facilitate that financing, it brings the subsidiary within the remedial purposes of the Act whether or not it is shown that the manufacturer ordered the specific conduct complained of. It would be unrealistic to suppose that a wholly owned subsidiary working to facilitate the parent's distributive activities would act other than to promote the desires of its parent. Thus the Act's "control" requirement is satisfied by showing corporate ownership and confluence of interest.

We find support for our position in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). In that case, a Chrysler sales subsidiary was held to be a manufacturer under the Act even though its only activity was to distribute automobiles manufactured by its parent. This result was reached despite the

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[3] A jury question may be presented if the requisite element of control is alleged on a basis other than corporate parental ownership. For example, a bank that is not a part of the manufacturer's corporate empire may be alleged to be under the manufacturer's control for purposes of the Act. The question would be one for the trier of fact. *See, e.g., Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437, 441-42 (1st Cir.), *cert. denied*, 385 U.S. 919, 87 S.Ct. 230, 17 L.Ed.2d 143 (1966).

fact that each corporation was legally independent and operated in its own sphere. *Id.* at 791. The court analyzed the issue as follows:

> The $107,000 judgment was entered against Chrysler Corporation and Chrysler Motors Corporation. Chrysler Corporation manufactures the automobiles but sells them only to Chrysler Motors Corporation, its wholly-owned sales subsidiary. Chrysler Motors has sole responsibility for distribution and marketing of Chrysler products, and it is this corporation alone which enters into franchise contracts with automobile dealerships.
>
> Clearly both Chrysler Corporation and Chrysler Motors are automobile manufacturers as defined in the Act. Chrysler Motors is such because it is a "corporation which acts for and is under the control of such manufacturer or assembler [Chrysler Corporation] in connection with the distribution of said automotive vehicles." 15 U.S.C. § 1221(a). Either could be sued for failure "to act in good faith in performing or complying with any of the terms or provisions of the franchise." 15 U.S.C. § 1222.[4]

447 F.2d at 791. The *Chrysler* case did not employ a specific transactional analysis of the Act's application. Instead, it focused on the general functional relationship between the parent and the subsidiary. We take the same approach here. We hold that the Act's provisions did apply to Ford Motor Credit. We therefore order a new trial on

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[4] The court went on to suggest that a further requirement for suit was that the defendant manufacturer have a contractual relationship or agreement with the dealer. 447 F.2d at 791. In the instant case, it is unquestioned that Ford Motor Credit had entered into a contractual relationship with Colonial.

the question of Ford Motor Credit's liability to Colonial under the provisions of the Act.

In addition, we expressly reaffirm our earlier conclusion that the acceptance of certain real estate installment payments by Ford Credit did not give rise to a waiver of its claims. We conclude, however, that the injunction ordered to remain in effect pending appeal—which injunction we previously indicated should be set aside—should be preserved until, upon remand, the district court is able to determine what remedial relief might be appropriate in light of today's decision. Subject to the opinion of this court as modified on rehearing, the fashioning of appropriate remedies is a matter that should be left to the court below.

Appendix C

Judgment of the Court of Appeals Upon Rehearing

IN THE
UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JANUARY TERM—FEBRUARY 5, 1979

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, and Honorable James K. Logan, Circuit Judges.

No. 76-2079, 76-2080, 76-2083

COLONIAL FORD, INC., a Utah corporation,

Plaintiff-Appellee, Cross-Appellant,

vs.

FORD MOTOR COMPANY, a Delaware corporation,

Defendant-Appellant,

and

FORD MOTOR CREDIT COMPANY, a Delaware corporation,

Defendant-Appellant, Cross-Appellee.

This matter comes on for consideration of the petitions of Ford Motor Company and Colonial Ford, Inc., for rehearing and suggestions for rehearing en banc filed June 14 and June 15, 1978, respectively.

The petition for rehearing of both parties was resolved by Judges Seth, Doyle and McKay, who heard the appeals.

On September 27, 1978, they granted rehearing without oral argument and on the existing briefs.

Through inadvertence and clerical oversight, the order on the granting of the petitions for rehearing was not formally entered.

Thereafter no judge in regular active service or a judge who was a member of the panel that rendered the decision requested a vote on the suggestions for rehearing en banc by the parties.

Upon consideration whereof, and in order to correct the clerical oversight, the Court orders, as follows:

1. Ford Motor Company's petition for rehearing is granted as of September 27, 1978, on the existing briefs.

2. Colonial Ford, Inc.'s petition for rehearing is granted as of September 27, 1978, on the existing briefs.

3. The suggestions for rehearing en banc by Ford Motor Company and Colonial Ford, Inc., there being no request by any qualified judge of the Court for a vote on such suggestions, are hereby denied.

4. The judgment entered on May 31, 1978, is vacated. The opinion of Judge Monroe G. McKay on rehearing is ordered filed this date.

5. The opinion of the Court filed May 31, 1978, with respect to the dispute between Ford Motor Company and Colonial Ford, Inc., is, as clarified in the opinion on rehearing on appeal filed February 5, 1979, reaffirmed.

6. Judgment is entered in accordance with the opinion filed in the captioned cause on May 31, 1978, as clarified by the opinion on rehearing filed February 5, 1979.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

Appendix D

Automobile Dealer's Franchise Act
15 U.S.C. §§ 1221-25 (1976)

15 U.S.C. § 1221. DEFINITIONS

As used in this chapter—

(a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

(b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract.

(c) The term "automobile dealer" shall mean any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons.

(d) The term "commerce" shall mean commerce among the several States of the United States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or among the Territories or between and Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

(e) The term "good faith" shall mean the duty of each party to any franchise, and all officers, employees, or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided,* That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith.

15 U.S.C. § 1222. AUTHORIZATION OF SUITS AGAINST MANUFACTURERS; AMOUNT OF RECOVERY; DEFENSES

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

15 U.S.C. § 1223. LIMITATIONS

Any action brought pursuant to this chapter shall be forever barred unless commenced within three years after the cause of action shall have accrued.

15 U.S.C. § 1224. Antitrust Laws as Affected

No provision of this chapter shall repeal, modify, or supersede, directly or indirectly, any provision of the antitrust laws of the United States.

15 U.S.C. § 1225. State Laws as Affected

This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1817

FORD MOTOR CREDIT COMPANY,
Petitioner,

v.

COLONIAL FORD, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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July 1979

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

This Brief is filed in opposition to the Petition for Certiorari, seeking to review a decision of the Tenth Circuit holding Ford Motor Credit Company ("Ford Credit"), a wholly-owned and controlled subsidiary of Ford Motor Company ("Ford Motor"), with $7½ Billion or 90 percent of its assets committed exclusively to financing the distribution of Ford cars, is subject to the Automobile Dealers Day In Court Act, 15 U.S.C. § 1221, *et seq.*, ("ADDICA").

QUESTIONS PRESENTED

1. Whether Ford Credit, a wholly-owned and controlled subsidiary of Ford Motor, with $7½ Billion or 90 percent of its assets committed exclusively to financing the distribution of Ford cars, is an entity "which acts for and is under the control of . . . [Ford Motor] in connection with the distribution of . . . [Ford cars]" within the definition of the term "automobile manufacturer" as provided for in Section 1221(a) of ADDICA, 15 U.S.C. § 1221(a).

2. Whether contractual privity is an essential element in determining the applicability of ADDICA under Section 1221(a) of that Act, or an essential element in determining the statutory liability of entities subject to ADDICA, pursuant to Section 1221(a), under the prohibitions of Section 1222 of the Act, 15 U.S.C. § 1222.

3. Whether the written contracts between Ford Credit and the plaintiff, Colonial Ford, providing for the financing of Colonial Ford's capital, wholesale and retail financing requirements with Ford Credit, are written agreements or contracts between Ford Credit and Colonial Ford which purport "to fix the legal rights and liabilities of the parties" to such contracts, within the definition of the term "franchise" as provided for in Section 1221(b) of ADDICA, 15 U.S.C. § 1221(b).

STATUTORY PROVISIONS INVOLVED

Section 1221(a) of ADDICA provides:

> (a) The term "automobile manufacturer" shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles. 15 U.S.C. § 1221(a).

Section 1221(b) of ADDICA provides:

> (b) The term "franchise" shall mean the written agreement or contract between any automobile manufacturer engaged in commerce and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract. 15 U.S.C. § 1221(b).

Section 1222 of ADDICA provides in pertinent part:

> An automobile dealer may bring suit against any automobile manufacturer . . . and shall recover the damages by him sustained and the cost of the suit by reason of the failure of said automobile manufacturer . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer . . . 15 U.S.C. § 1222.

STATEMENT OF THE CASE

1. *Parties.* Colonial Ford, Inc., the plaintiff in the District Court, was a Ford dealer. Mr. LeGrande Belnap was the original owner and sole investor in Colonial. Ford Motor, a defendant, is the nation's second largest automobile manufacturer. The issue decided by the Tenth Circuit focused on the function and relationship of the other defendant, Ford Credit, to Ford Motor.

Ford Credit is a wholly-owned subsidiary of Ford Motor. (309; PX-38.)[1] Eight of Ford Credit's 13 directors are also officers and directors of Ford Motor, including the Chairman of the Board, Henry Ford, and the Chairman of Ford's Dealer Policy Board, Benson Ford. (680-81; PX-38.) Ford Credit alone has assets in excess of $8½ Billion, and 90 percent of those assets, or over $7½ Billion, are invested by Ford Credit exclusively in financing the distribution of Ford cars. (PX-38.) Ford Credit provides capital loans to Ford dealers, wholesale flooring for Ford dealers' new car inventories and retail financing for the sale of cars by Ford dealers to consumers. The financing Ford Credit provides for dealers materially and significantly assists Ford Motor in the distribution of Ford cars. (312.) Ford Credit only provides financing for Ford dealers. (311-12, 486-87.) It does not provide financing for General Motors, Chrysler or American Motors dealers. *Id.*

[1] Page citations are to the Joint Appendix filed in the United States Court of Appeals for the Tenth Circuit. Citation to exhibits are to the exhibit numbers used in the United States District Court, reprinted in volumes 7, 8 & 9 of the Joint Appendix; plaintiff's exhibits are marked PX- ; Ford Motor's exhibits are marked DX- ; and Ford Credit's exhibits are marked DCX- .

2. *Statement of Facts.* Ford Credit's Statement of the Case, in its Petition for Writ of Certiorari, is made without a single citation to the record. While Rule 21 of this Court no longer requires the record to be filed prior to docketing a Petition for Writ of Certiorari, the Rule was not intended to grant a petitioner poetic license. Perhaps, Ford Credit's new counsel lacks familiarity with the 2,500 pages of trial testimony and over 200 trial exhibits; the Petition, however, does not remotely set forth a fair summary of Colonial's ADDICA claim against Ford Credit.

Colonial did not claim, as the Petition for Writ of Certiorari repeatedly states, that Ford Credit, "as a wholly-owned subsidiary of Ford Motor, should have been held liable under the Franchise Act for the conduct of Ford Motor . . . ." (Pet. for Cert. at 7; *See also*, at 15.) Colonial claimed Ford Credit should have been held liable for Ford Credit's own coercive conduct. (990-96.) Colonial claimed Ford Motor and Ford Credit, through a continual course of conduct, had deprived Colonial of the right to run its own business and to control critical aspects of its business, including its management, facilities and finances. (990-91.)

Ford Credit entered the picture in 1972 at a time when Ford Motor was attempting to coerce Colonial to relocate at a Ford Motor selected location. (201-07; PX-7.) Ford Motor pressured Colonial to secure its financing for the new location from Ford Credit. (207.) Colonial resisted because it wanted to purchase a substantially less expensive location (201-02.), and because Colonial wanted to maintain its independent financing sources. (210.)

Ford Credit insisted that if it provided Colonial with capital financing for a new location, Colonial would also have to give Ford Credit its wholesale and retail financing requirements. (210.) Colonial objected to Ford Credit's demand and took the matter up with Ford's district manager, Mr. Parr. Mr. Belnap told Mr. Parr Ford Credit didn't "just want the financing of the building, now he wants me to divest myself of all banking connections and give him the wholesale flooring line and retail contracts." (212.) Mr. Parr replied, "Well, if you have to do it, give it to him. It's all in the Ford family." (212.) Mr. Belnap, nonetheless, continued to resist. *Id.*

On June 2nd, Mr. Parr came to Colonial's office, served Colonial with a notice of termination of Colonial's one-year term franchise, and issued Colonial a three-month franchise, expiring September 15, 1972. (PX-10.) Mr. Parr told Mr. Belnap that he would either have a commitment on the location Ford wanted by September or Colonial would lose its Ford franchise. (214-15.) Mr. Belnap finally capitulated, and Colonial committed to Ford Credit on June 16, 1972. (215-16; PX-11, PX-12, PX-13, PX-14, PX-15.) Ford Credit demanded, as a condition of its capital loan commitment, all of Colonial's wholesale and retail financing requirements. (PX-15, PX-19, PX-20.)

Before being coerced into its commitment with Ford Credit, Colonial had placed very few retail contracts with Ford Credit — 4 in 1969; 25 in 1970; and 9 in 1971. After June of 1972, Colonial placed 202

contracts with Ford Credit in 1972; 415 in 1973; and 550 in 1974. (478-79, 912-13.)

Ford Credit's relationship with Colonial was reflected in numerous written contracts between Colonial and Ford Credit (PX-12, PX-15, PX-19, PX-20, PX-21.), including a wholesale flooring agreement and a capital loan security agreement. (PX-12, PX-20.) Colonial's contracts with Ford Credit were hardly the "garden-variety" arrangements Ford Credit claims. (Pet. for Cert. at 13.) The capital loan agreement not only gave Ford Credit a security interest in Colonial's facilities and real estate, but also gave Ford Credit a security interest in all of Colonial's assets (PX-20.), effectively precluding any other financing relationship for Colonial. The capital loan agreement required Colonial to offer Ford Credit all of Colonial's retail contracts. Specifically, the agreement provided that Colonial was to:

> [o]ffer to FMCC for purchase under FMCC's Retail Plan in effect at the time all retail installment contracts arising out of the sale of goods and services offered for sale by the Borrower in the ordinary course of its business unless the retail purchaser thereof specifically requests otherwise. (PX-20 at ¶ 4.9.)

The financial relationship between Ford Credit and Colonial was not, as Ford Credit claims, "wholly independent of the franchise relationship between Ford Motor and Colonial." (Pet. for Cert. at 12.) Colonial was required to execute an agreement with Ford Motor and Ford Credit requiring Colonial to give Ford Motor the unconditional right to occupy Colonial's new facil-

ities "if for any reason Colonial . . . should cease to be a Ford dealer at the proposed location." (PX-19.) This contractual provision gave Ford absolute control over Colonial's facilities. (434; PX-19.)

After Ford Credit secured control of Colonial's financing requirements, Ford Credit worked with Ford Motor to build Colonial as a volume dealership without regard for Colonial's financial interest. Ford Credit, contrary to its standard procedure, failed to conduct a feasibility study to determine whether Colonial's new facility was within the dealership's financial capability. (489.) Ford Credit financed a build-up in Colonial's new car inventory by exceeding the limits on Colonial's authorized flooring line in amounts of up to $1 Million. (233; PX-72.) When Colonial's increased costs, attributable to its new facility and new car inventory build-up, caused working capital problems, Ford Credit financed Colonial by allowing Colonial to float against Ford Credit. (499-501, 879-82; PX-62, PX-63, PX-64.)

Ford Credit never advised Mr. Belnap Colonial's new car inventory was overline or Colonial was floating against Ford Credit. (233-35.) In fact, as late as July 30, 1974, Ford Credit recommended Colonial's new car flooring line be increased from $1.2 Million to $1.7 Million, and concluded, in an internal memorandum, Colonial had "done a respectable job." (PX-64.)

In August of 1974, however, Ford Credit, without warning, reversed its policy and decided to dry up Colonial's float. (448, 501-02; PX-66, PX-67.) On Aug-

ust 26, 1974, Ford Credit informed Mr. Belnap that Colonial would need $218,000.00 by September 1st. (PX-25.) This was the first time that Mr. Belnap had been informed that Colonial was out-of-trust and that additional cash would be required to operate the dealership. (234-35.) Ford Credit commenced to audit and re-audit Colonial to dry up its float, and on September 10th, when Colonial was unable to pay off a wholesale audit, Ford Credit suspended Colonial's wholesale line. (238, 502-03; PX-68.) Even though Mr. Belnap thereafter resumed active control of the dealership, was able to pay off the out-of-trust condition by September 24, and was never out of trust again, Ford Credit refused to restore Colonial's wholesale line. (239-40, 503.) Unable to finance the purchase of new cars, Colonial's new car inventories shrank month by month, and Colonial commenced to sustain heavy losses. (245-46.) When the District Court, after evidentiary hearing, entered a preliminary injunction restoring Colonial's flooring line, Colonial was virtually out of business. (504.)

3. *Opinions Below.* Colonial Ford's ADDICA claim against Ford Credit presented two fundamental issues — the issue of applicability and the issue of liability. The issue of applicability turned on the questions:

(a) whether Ford Credit was a corporation "which acts for and is under the control of" Ford Motor; and

(b) whether Ford Credit functioned "in connection with the distribution" of Ford cars;

within the definitional language of Title 15 United States Code Section 1221(a). Both of these questions were submitted by the District Court to the jury as questions of fact under an instruction (Instruction No. 32) that in order to find Ford Credit subject to ADDICA:

> you must find by a preponderance of the evidence that under the circumstances of this case . . . Ford Credit acted for Ford Motor. Second, that Ford Credit was under the control of Ford Motor. Third, that the actions of Ford Credit, for and under the control of Ford, were in connection with the distribution of automobiles. (989-90.)

Colonial objected to this instruction on the ground that on the uncontroverted facts Ford Credit acted for and was under the control of Ford Motor in connection with the distribution of Ford cars, and, therefore, Ford Credit was subject to ADDICA as a matter of law.

The United States Court of Appeals for the Tenth Circuit, in its first decision, held, Judge McKay dissenting, that the District Court properly submitted the issue of applicability to the jury as a question of fact. *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106 (10th Cir. 1978). On petition for rehearing, granted on the parties' briefs, the Tenth Circuit reversed itself and unanimously held Ford Credit was subject to ADDICA as a matter of law, and remanded the case for a new trial against Ford Credit on the issue of

liability. *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106 (10th Cir. 1978); *modified in part on rehearing, Colonial Ford, Inc. v. Ford Motor Co.*, 592 F.2d 1126 (10th Cir. 1979), *reh. denied.*

REASONS FOR DENYING THE WRIT

The whole thrust of Ford Credit's petition is an attempt to confuse the issues of statutory applicability and liability. The question whether Ford Credit "acts for and is under the control of . . . [Ford Motor] in connection with the distribution of . . . [Ford cars]" so as to be subject to ADDICA, presents neither a question of Ford Credit's liability for the coercive conduct of Ford Motor, nor a question of Ford Motor's vicarious liability, on agency grounds, for the conduct of its wholly-owned subsidiary. The question is whether Ford Credit shall be liable for its own coercive conduct under the Act. The question is whether Ford Credit's relationship with Ford Motor, and its function in the distribution of Ford cars, brings it within the plain language of the Automobile Dealers Day In Court Act, and serves the Congressional purpose of redressing the gross imbalance between automobile manufacturer and dealer which so sorely plagued the business independence of thousands of automobile dealers.

Ford Credit's representation to this Court that the decision of the Tenth Circuit, holding Ford Credit subject to ADDICA as a matter of law, conflicts with the decisions of three other circuits is categorically false. The Tenth Circuit's decision does not conflict with a single decision of any circuit, let alone a pattern of

intermediate appellate authority. On the contrary, in holding Ford Credit subject to ADDICA as a matter of law, the Tenth Circuit properly followed the very decision on which Ford Credit relies to support its claim of conflict — *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971).

The Tenth Circuit's decision simply recognizes, as a matter of economic reality, that the commitment of $7½ Billion exclusively to the financing of Ford dealers serves the distributive purposes of the automobile manufacturer and substantially augments its economic power in relationship to its independent dealers. The deployment of such massive financing by an automobile manufacturer in its business relations with its dealers brings such financing within the terms and purposes of the Act. Ford Credit's position is that if the financing relationship Ford has employed with Ford dealers is not within the four corners of a Ford Sales and Service Agreement, it is beyond the scope of ADDICA. If Ford's Sales and Service Agreement provided that Ford would furnish all of a dealer's financing requirements, would there be any question that ADDICA extended to the financial aspects of Ford's relationship with its dealers? If Ford's Sales and Service Agreement with Colonial had provided that (1) Colonial would obtain all of its financing requirements from Ford, including its wholesale flooring, (2) Colonial was required to place its retail contracts on the sale of new cars with Ford, (3) granted Ford a lien on all of Colonial's assets, and (4) granted Ford the right to operate a Ford dealership at Colonial's facilities if Colonial "for any reason" ceased being a Ford dealer, would

there be any question that ADDICA extended to those financial aspects of the Ford/Colonial relationship? Does it make any difference, under ADDICA, that Ford achieved the same ends through a wholly-owned subsidiary and separate pieces of paper? Ford Credit repeatedly claims a financial relationship is independent of a franchise relationship, but if the automobile manufacturer has made a financial relationship part and parcel of the franchise relationship, then the financial aspects of the franchise relationship are entitled to the Congressionally-intended protection of ADDICA.

The issue in this case is simply whether ADDICA applies to a wholly-owned subsidiary whose purpose and function is to facilitate the distribution of cars manufactured by its parent. The clear language and purpose of the Act command that application.

1. *Ford Credit "acts for and is under the control" of Ford.*

The plain language of Section 1221(a) makes ADDICA applicable to any corporation "which acts for and is under the control" of any automobile manufacturer. The courts have uniformly held ownership of a subsidiary by an automobile manufacturer establishes the requisite control. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971); *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966), *cert. denied*, 385 U.S. 919 (1966); *DeCantis v. Mid-Atlantic Toyota Distributors, Inc.*, 371 F. Supp. 1238 (E.D. Va. 1974); *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172 (S.D. Cal.

1959). Furthermore, the courts have held the question of control turns not on whether the parent manufacturer has in fact controlled the relationship of the subsidiary with regard to a particular dealer, but whether the manufacturer has the power to control. Thus, the First Circuit has held "[i]t was not error to exclude defendant's proffered evidence as to the manufacturer's actual involvement with plaintiff's franchise. What matters is that it had the power." *Volkswagen Interamericana, S.A. v. Rohlsen, supra* at 442.

The Tenth Circuit, in its first decision, diverged from this uniform line of authority and held "[t]he 'acts for' or 'under the control' provisions must relate to the transactions or circumstances out of which the cause of action arose." *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106, 108 (10th Cir. 1978). On rehearing, the Court rejected this particular circumstances test and held a wholly-owned subsidiary of the manufacturer acts for and is under the control of a manufacturer within the Act as a matter of law. *Colonial Ford, Inc. v. Ford Motor Co.*, 592 F.2d 1126, 1128-29 (10th Cir. 1979). The Circuit's decision on rehearing, in accord with the uniform state of authority, focused on the "fundamental relationship between the parent and the subsidiary." *Id.* at 1129-1130.

The very case Ford Credit urges as establishing a conflict with the Tenth Circuit's decision, on the contrary, rejected a transactional analysis and likewise held the parent-subsidiary relationship established the requisite control as a matter of law. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786

(5th Cir. 1971). In *York*, Chrysler marketed its cars through a wholly-owned subsidiary, Chrysler Motors. Chrysler had not, in any way, controlled Chrysler Motors' conduct with the plaintiff dealer. The court nevertheless held that Chrysler Motors was subject to the Act, stating "[c]learly both Chrysler Corporation and Chrysler Motors are automobile manufacturers as defined in the Act. Chrysler Motors is such because it is a 'corporation which acts for and is under the control of . . . [Chrysler Corporation] . . .'" *Id.* at 791. The court specifically distinguished between the issue of applicability and liability. The question is not whether the parent is liable for the acts of the subsidiary, the question is whether the parent's power to control subjects the subsidiary to the Act.

Any requirement in addition to the parent-subsidiary relationship would only fragment and frustrate the Congressional policy of prohibiting coercion in the economically imbalanced relationship between manufacturer and dealer. If total corporate ownership does not establish the "acts for and under control" requirements of the statute, the application of the Act would vary from case to case. More importantly, what additional proof could be offered in most cases to show that a manufacturer controls its subsidiary? Historically, automobile manufacturers, such as Chrysler and American Motors, have, in fact, marketed their automobiles through wholly-owned subsidiaries. The manufacturer assigns the subsidiary the responsibility of distribution and only generally controls that function through its corporate ownership. The manufacturer does not exercise operational control of the subsidiary's marketing

responsibility, let alone actually control the subsidiary's relationship with a particular dealer. If the power to control, inherent in the parent-subsidiary relationship, does not satisfy the control requirements of the Act, such a subsidiary would be removed from the coverage of the Act merely by the intracorporate division of a manufacturer's economic power, and Congress' purpose in redressing the economic imbalance between manufacturer and dealer would be thwarted.

2. Ford Credit's $7½ Billion financing of Ford dealers is "in connection with the distribution" of Ford cars.

The plain language of the statute makes it applicable to any automobile manufacturer's subsidiary which functions "in connection with the distribution" of the manufacturer's automobiles. The phrase, as the Tenth Circuit noted, is an "inclusive definition." It is not limited by its terms to distribution subsidiaries. The statute does not provide that only controlled entities which are "engaged in distribution" shall be subject to the Act; rather it extends the Act's coverage to controlled entities which function "in connection with the distribution" of a manufacturer's cars.[2]

Not one circuit case has ever held that a wholly-owned credit subsidiary of an automobile manufacturer is beyond the Act's coverage. The cases cited by Ford

[2] As the Court has noted, "[t]his Court naturally does not review congressional enactments as a panel of grammarians; but neither . . . [does the Court] regard ordinary principles of English prose as irrelevant to a construction of those enactments." **Flora v. United States**, 362 U.S. 145, 150 (1960).

Credit do not factually or analytically involve a credit subsidiary of an automobile manufacturer. *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978); *Lawrence Chrysler Plymouth, Inc. v. Chrysler Corp.*, 461 F.2d 608 (7th Cir. 1972); *Stansifer v. Chrysler Motors Corporation*, 487 F.2d. 59 (9th Cir. 1973); *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 824 (N.D. Ga. 1976). Whereas in *York*, the Fifth Circuit held that the Act was applicable to the coercive conduct of Chrysler's credit subsidiary. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786, 792, n.6 (5th Cir. 1971).

The distribution of automobiles involves more than merely their sale and transportation. It also involves financing such distribution, and that is precisely why Ford has established a subsidiary with $7½ Billion committed exclusively to the financing of Ford dealers. The Tenth Circuit's conclusion, that the business purpose and function, served by a resource commitment of that magnitude, is "in connection with the distribution of" Ford cars, simply accords with economic reality.

The inclusion of such a commitment within the scope of the Act also accords with the statute's conceded purpose. Congress found that while automobile dealers "were ostensibly independent businessmen, the factory dominated and controlled almost every phase of their operations at all times. The conflict of interest between factory and dealer is a conflict between parties of totally unequal economic power" [S. Rep. No. 2073, 84th Cong., 2d Sess. 2 (1956)], and Congress' purpose

in enacting ADDICA was to redress that imbalance. *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510, 515 (10th Cir. 1976); *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172, 174-75 (D.C. Cal. 1959); *DeCantis v. Mid-Atlantic Toyota Distributors, Inc.*, 371 F. Supp. 1238, 1241 (E.D. Va. 1974); *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971); *American Motors Sales Corp. v. Semke*, 384 F.2d 192 (10th Cir. 1967). Financing a dealer's capital, wholesale and retail financing requirements obviously increases the manufacturer's power with regard to a dealer, and the commitment of $7½ Billion exclusively to Ford dealers demonstrates that Ford dealers are dependent on Ford Credit for their financing. Indeed, it was the risk of Ford's abusing this concentration of power in relation to Ford dealers that gave rise to the government's consent decree against Ford and Ford Credit. *United States v. Ford Motor Co.*, Civil Action No. 8 (N.D. Ind., filed Nov. 15, 1938), *modified*, 1953 Trade Cas. (CCH) ¶67,437 (N.D. Ind. 1953). If Congress' purpose was to redress the disparity in economic power between manufacturer and dealer, it certainly did not intend to immunize major segments of a manufacturer's power from the reach of the Act. Coercion upon a dealer can be imposed through the financing relationship just as it can be imposed through the supply relationship. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). Clearly Congress did not intend to cover one aspect of an automobile manufacturer's power with regard to a dealer and not the other. If Ford has made financing an in-

tegral part of the manufacturer-dealer relationship, the protection afforded by the Act should be co-extensive with the economic power the manufacturer inserts into that relationship.

3. *Contractual privity is not an essential element in determining either applicability or liability under ADDICA.*

Despite Ford Credit's repeated assertions, it is clear from the language of ADDICA that contractual privity between manufacturer and dealer is not a prerequisite to the Act's applicability. Section 1221(a) governs the determination of which entities are to be subject to the Act as "automobile manufacturers," and there is no mention of contractual privity within that section. Furthermore, no Federal Court has ever held contractual privity an essential element of the Act's applicability. *Accord. York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971).

The majority of courts, moreover, hold that contractual privity is not an essential element of liability under Section 1222 of the Act. *Rea v. Ford Motor Co.*, 497 F.2d 577 (3d Cir. 1974); *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965); *DeCantis v. Mid-Atlantic Toyota Distributors, Inc.*, 371 F. Supp. 1238 (E.D. Va. 1974); *Barney Motor Sales Corp. v. Cal Sales, Inc.*, 178 F. Supp. 172 (S.D. Cal. 1959). This rule has been applied so as to permit actions under Section 1222 by plaintiffs and against defendants who were not parties to the franchise agreement. Section

1222, in setting forth the standards of liability under ADDICA, prohibits:

> failure . . . to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer . . . 15 U.S.C. § 1222.

These cases hold that so long as there is a franchise agreement, an action may be maintained by or against persons or entities affiliated with the parties to the franchise. The rationale is that it was Congress' purpose to provide a comprehensive prohibition against manufacturer coercion in dealer relations, regardless whether the manufacturer's economic power was divided among corporate affiliates. These courts have found that "the essence of the Act . . . was to provide that this chain of domination, whether forged of one link or of many, was to be broken." *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172, 175 (S.D. Cal. 1959).

The rejection of contractual privity as an essential element of liability is likewise in accord with the legislative history. Congress' purpose was to provide dealers with a statutory right of action regardless of formal contractual requirements. *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966); *DeCantis v. Mid-Atlantic Toyota Distributors, Inc.*, 371 F. Supp. 1238 (E.D. Va. 1974); *Barney Motor Sales v. Cal Sales, Inc.*, 178 F. Supp. 172 (S.D. Cal. 1959). Congress was highly critical of the one-sided nature of automobile manufacturers' contracts with their dealers

[S. Rep. No. 2073, 84th Cong., 2d Sess. (1956)], and the House Report states:

> This bill assures the dealer an opportunity to secure a judicial determination, irrespective of the contract terms, as to whether the automobile manufacturer has failed to act in good faith . . . H. R. Rep. 2850, 84th Cong., 2d Sess. 4600 (1956).

Congress thus, was concerned with protecting automobile dealers against manufacturer coercion irrespective of any contractual limitation.

If a franchise relationship exists between automobile manufacturer and dealer, but the manufacturer has divided its economic power and functions among corporate affiliates, what purpose is served by requiring contractual privity with each corporate affiliate? Take the case of Chrysler and Chrysler Motors where the automobile manufacturer has divided its economic power and functions between a parent manufacturer and a wholly-owned subsidiary distributor. Both companies are subject to the Act. Both companies are prohibited from engaging in coercion in their dealer relations. If a Chrysler franchise relationship exists, what difference does it make whether Chrysler or Chrysler Motors is the contracting party. Both, under the terms and purposes of the Act, should be liable for their own coercion in that franchise relationship. Indeed, the cases relied upon by Ford Credit are wholly consistent with this analysis. *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978); *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971).

In those cases, which in fact involved Chrysler and Chrysler Motors, Chrysler not only was not a signatory to the franchise agreement, but also had not had any direct dealings, let alone coercive dealings, with the complaining dealer. The Ninth Circuit made the distinction:

> The question remains, however, whether Chrysler Corporation can be liable for noncompliance with, or termination of, the franchise agreement in the absence of contractual privity or some dealing with Marquis. *Marquis v. Chrysler Corp.*, *supra* at 629. (Emphasis supplied.)

The Ninth Circuit acknowledged that contractual privity would not be a requirement of liability if Chrysler had dealt directly and coercively with the plaintiff. *Id.* The Ninth Circuit thus holds that a corporate affiliate of a franchisor is liable for its own coercive conduct regardless of contractual privity. Colonial in this case only sought to impose liability on Ford Credit for Ford Credit's own coercive conduct, and under either line of authority, contractual privity would not be an essential element.

4. *Even if contractual privity is an essential element of liability, Ford Credit and Colonial were in contractual privity to written "franchise" contracts within the meaning of the Act.*

Colonial's business relationship with Ford Credit was reflected in various written contracts between Ford Credit and Colonial that were "franchise" agreements within the definitional language of the Act. 15 U.S.C. 1221(b). The Act defines the term "franchise" to mean:

> the written agreement or contract between any automobile manufacturer . . . and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract. 15 U.S.C. 1221(b).

Colonial's contracts with Ford Credit included a wholesale flooring agreement for Colonial's flooring requirements (PX-12, PX-13, PX-14.), a capital loan agreement and trust deed which granted Ford Credit a security interest in all of Colonial's assets and required Colonial by its express terms to place its retail contracts with Ford Credit (PX-20, PX-21.), and a tri-party agreement between Colonial, Ford Motor and Ford Credit which gave Ford the right to occupy Colonial's new facilities "if, for any reason, Colonial . . . should cease to be a Ford dealer . . . ." (PX-19.)

The Tenth Circuit's conclusion that these agreements constituted contractual relations subject to the Act is correct. *Colonial Ford, Inc. v. Ford Motor Company*, 592 F.2d 1126, 1129, n. 4 (10th Cir. 1979). The language of Section 1221(b) contains no subject matter restriction on the contracts which are to be included within the term "franchise" and it has been held that the word "franchise" is not restricted to a single document, but includes all contracts which relate to the manufacturer-dealer relationship. *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965). There is no question that if the terms of the agreements between Colonial and Ford Credit had been included in the agreements between Colonial and Ford Motor, Ford Motor would have been liable for its coercion in connection with the business relationship reflected in those

agreements. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). The Tenth Circuit's conclusion that a Ford subsidiary is similarly subject to liability for its coercion does not warrant the exercise of this Court's certiorari jurisdiction.

CONCLUSION

The Petition for Certiorari should be denied.

DATED this 30th day of July, 1979.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1978-79

No. 78-1817

FORD MOTOR CREDIT COMPANY, *Petitioner,*

v.

COLONIAL FORD, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY OF FORD MOTOR CREDIT COMPANY

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REPLY OF FORD MOTOR CREDIT COMPANY

At the conclusion of its Brief in Opposition, Respondent Colonial Ford, Inc. ("Colonial") addresses the key question raised by the Tenth Circuit's decision below: Does every contract between any affiliate of an automobile manufacturer and an automobile dealer constitute a *franchise* agreement subject to the special standards of the Automobile Dealer's Franchise Act? 15 U.S.C. §§ 1221-25 (1976).

Colonial contends that every such agreement between an affiliate of a manufacturer and a dealer is subject to the Act. *See Brief in Opp.* at 22-24.

Ford Credit submits that the Act is much more limited in scope and applies only to the core franchise relationship—the agreement by which a manufacturer supplies its dealer with automobiles. The Tenth Circuit's extension of the Act to non-franchise arrangements conflicts with the clear terms of the statute, its legislative history, and the decisions of every other court of appeals which has considered the question. Unless a Writ of Certiorari issues, non-automotive affiliates of automobile manufacturers will be subjected to discriminatory and anti-competitive treatment; and a whole new species of federal question commercial litigation will be created, adding to the burdens on the federal courts.

1. The Controlling Facts Are Not In Dispute.

The facts which govern the decision below, and the issues now before the Court, are undisputed. In 1969, Colonial entered into a franchise agreement with Ford Motor which provided for the sales of Ford automobiles by Colonial. Ford Motor was at all times directly responsible to Colonial for its obligations under that franchise agreement. Indeed, in the companion case before this Court, Colonial strenuously argues that the jury was correct in holding Ford Motor liable for breaching its franchise obligations under the special, strict standards of the Franchise Act.[1]

Ford Credit was not a party, and never became a party, to that Ford Motor-Colonial franchise agreement. Indeed, Colonial operated under its franchise

[1] *Ford Motor Co.* v. *Colonial Ford Inc.*, No. 78-1818. It should be emphasized that Ford Motor does not dispute that the Franchise Act governs the performance of its franchise agreement with Colonial.

from Ford Motor for a number of years without any credit arrangement with Ford Credit.

In its brief, Colonial repeats its owner's allegations that Ford Motor and Ford Credit conspired to coerce Colonial to use Ford Credit's financial services. *Brief in Opp.* at 5-9. These allegations, however, are simply not relevant to the issues before the Court. Suffice it to say, Colonial's charges were refuted by ample evidence in the record and were rejected by the jury which held for both Ford Motor and Ford Credit on Colonial's antitrust conspiracy claim. The jury's findings on this point were in no way altered by the Tenth Circuit's decision.

Similarly irrelevant is Colonial's speculation as to what the facts *might have been* if the antitrust laws and Ford Motor's antitrust consent decree [2] did not exist, and if Ford Motor had incorporated some credit relationship with Colonial in the franchise agreement. *Brief in Opp.* at 12-13. The facts are that Ford Motor's franchise agreement with Colonial was separate from, and independent of, Ford Credit's financing agreement with Colonial; and that Colonial did business for a number of years with a franchise agreement with Ford Motor but without any financial arrangement with Ford Credit.

2. The Franchise Act Does Not Apply To Every Agreement Between An Automobile Dealer And An Affiliate Of An Automobile Manufacturer.

Colonial's contention that any agreement between an automobile dealer and any affiliate of an automobile

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[2] See *United States* v. *Ford Motor Co.*, 1952-54 Trade Cas. (CCH) ¶ 67,437 (N.D. Ind. 1953) discussed in Ford Credit's Petition at 24-25.

manufacturer constitutes a "franchise" subject to the special standards of the Franchise Act must be rejected for a number of reasons.

First, Congress clearly did not intend the Act to apply to every arrangement between a dealer and its manufacturer. During the floor debate on the bill which ultimately became the Act, the Senate eliminated language which would have expanded the Act's coverage to "all dealings or transactions" between a manufacturer and its dealers. S.3879, 84th Cong., 2d Sess. § 2 (1956). As one commentator has noted, the Franchise Act was "not designed to apply to the entire relationship between the manufacturer and dealer, but only to that part of their relationship governed by the written franchise." Note, *Statutory Regulation of Manufacturer-Dealer Relationships in the Automobile Industry,* 70 Harv. L. Rev. 1239, 1246-47 (1957).

Second, Colonial's contention that there can be a multitude of "franchises" between a manufacturer and a particular dealer conflicts with the clear terms of the Act. The Act defines the term "franchise" in the singular: "*the written agreement or contract* between any automobile manufacturer . . . and any automobile dealer which purports to fix the legal rights and liabilities of the parties to such *agreement or contract.*" 15 U.S.C. § 1221(b). (Emphasis added.) If Congress had intended the Act to apply to *all* commercial relationships between affiliates of automobile manufacturers and dealers, it would have used the plural; it would have defined "franchise" to mean "*all* written agreements . . ." or "*any* written agreements . . . ."

Third, Colonial's excessively broad reading of the Act conflicts with the consistent rulings of every court

which had previously been asked to extend the Act beyond the core manufacturer-dealer relationship. Prior to the Tenth Circuit's decision below, no court had ever held that a credit subsidiary of an automobile manufacturer was subject to the Franchise Act with respect to its financial arrangements with a dealer.[3] The only court that appears to have ruled precisely on the question held that the credit arrangements between a financial subsidiary of an automobile manufacturer and one of the manufacturer's dealers are *not* governed by the Act. In *Chumbley* v. *General Motors Corp.*, Civil No. 6-71125 (E.D. Mich. Sept. 19, 1977),[4] the court reviewed the legislative history of the Franchise Act and concluded that Congress did not intend it to apply to such financial arrangements. The court noted that although one of the bills which ultimately led to the Franchise Act would have applied to the "financing [of] motor vehicles intended for resale,"[5] that language was not included in the Act when it was ultimately adopted. Emphasizing that the re-

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[3] Colonial mistakenly suggests that the Fifth Circuit applied the Franchise Act to a credit subsidiary in *York Chrysler-Plymouth, Inc.* v. *Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971). As the court of appeals noted, Chrysler's credit subsidiary was not even a defendant in the dealer's action against Chrysler and its marketing subsidiary. *Id.* at 792, n.6. The court of appeals squarely held that only the franchisor which had entered into the franchise agreement with the dealer could be held liable under the Act. *Id.* at 791.

[4] The court's unreported decision, which came to the attention of petitioner after the filing of the instant petition, is reprinted in the appendix hereto.

[5] H.R. 10310, 84th Cong., 2d Sess. § 3(a) (1956), reprinted in *Automobile Marketing Legislation: Hearings Before Subcomm. of the Comm. on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. 384 (1956).

medial purpose of the Act was limited to the core franchise relationship between an automobile manufacturer and its dealers, the court held that the Act could not be "stretched to cover finance companies, even when wholly owned by a manufacturer." *Id.* at 3, App. 3a.

As we noted in our petition, the Tenth Circuit's application of the Franchise Act to Ford Credit is also flatly inconsistent with the rulings of three other appellate courts that the Act does not extend to firms which are not parties to, or directly responsible for, the core manufacturer-dealer franchise relationship. *Marquis* v. *Chrysler Corp.*, 577 F.2d 624, 629 (9th Cir. 1978); *Stansifer* v. *Chrysler Motors Corp.*, 487 F.2d 59, 63-64 (9th Cir. 1973); *Lawrence Chrysler Plymouth, Inc.* v. *Chrysler Corp.*, 461 F.2d 608, 613 (7th Cir. 1972); *York Chrysler-Plymouth, Inc.* v. *Chrysler Credit Corp.*, 447 F.2d 786, 791 (5th Cir. 1971). *See also Joe Westbrook, Inc.* v. *Chrysler Corp.*, 419 F. Supp. 824, 831 (N.D. Ga. 1976).[6]

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[6] It is likewise clear that the Tenth Circuit improperly extended the Act when it ruled that the issue of whether Ford Credit was a firm which "acts for and is under the control of" an automobile manufacturer, so as to subject Ford Credit to the strict standards of the Act, was not a question for the jury. Colonial admits that the Tenth Circuit erected an irrebuttable presumption that any wholly owned subsidiary of an automobile manufacturer always acts as an agent for the manufacturer notwithstanding the facts of a particular case.

As described in Ford Credit's petition (pp. 21-27), the Tenth Circuit's ruling on the agency issue is flatly inconsistent with the clear terms of the Act, its legislative history, and the decisions of a number of other courts which have held—consistent with due process standards—that this issue constitutes a factual question which must be decided by the jury after a full review of the specific circumstances in each case. Colonial does not challenge or distinguish any of the authority cited in Ford Credit's petition on this point, and it remains an independent reason for issuing the requested writ.

Colonial's attempt to distinguish these decisions on the grounds that they do not involve credit subsidiaries is unavailing. The decisions clearly establish that a financial institution such as Ford Credit, which was never a party to the franchise agreement between a manufacturer and its dealer, cannot be held to the strict standards of the Franchise Act unless that non-party controlled the signatory to the franchise agreement and used it as a buffer to escape its own franchise obligations.[7]

Colonial has not even alleged, much less proven, that Ford Credit erected Ford Motor as a straw party to escape any such franchise obligations. To the contrary, it is undisputed that Ford Motor directly assumed all of its obligations as Colonial's franchisor and has been held to those obligations in this case.

Fourth, Colonial's all-encompassing definition of a "franchise" conflicts with the public policy behind the Act. Consider the diverse non-automotive businesses in which the subsidiaries of automobile manufacturers now engage. Ford Motor, for example, has subsidiaries involved in land development, insurance, and a wide range of non-automotive manufacturing. According to Colonial, whenever any of these subsidiaries enters

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[7] Colonial's reliance on a few cases in which the courts looked beyond the signatories to a franchise agreement to allow a *subsidiary of the franchisee* to maintain an action, or to hold the *parent of the franchisor* to the obligations of the Act, is equally invalid. *Brief in Opp.* at 19. In each of those cases, the courts confined the operation of the Act to parties directly responsible for the core manufacturer-dealer franchise relationship. None of the cases supports the Tenth Circuit's expansion of the Act to an independent credit relationship between a dealer and non-party to the franchise agreement where, as here, the franchisor-manufacturer is fully responsible for its franchise obligations.

into any type of agreement with an automobile dealer, the subsidiary's compliance with that agreement must be governed by the special standards of the Franchise Act.

As demonstrated above, both the clear terms and the legislative history of the Act permit no such result. As even Colonial admits, the Act was designed solely to remedy the perceived unequal bargaining power enjoyed by the few firms which manufacture automobiles over the many dealers dependent on the supply of those automobiles for their very existence.

Congress believed this unequal bargaining power justified the imposition of strict standards upon the manufacturer's performance of its franchise obligation to provide automobiles to its dealers. But Congress made no equivalent finding that the dealers were dependent on anything else, such as financing or non-automotive products, that the manufacturer or any of its affiliates might provide.

Colonial now attempts to rewrite this legislative history by asserting, without any supporting evidence, that "Ford dealers are dependent on Ford Credit for their financing." *Brief in Opp.* at 18. That, however, is simply not true. Approximately 40 percent of all Ford dealers operate their franchises without any financing whatsoever from Ford Credit. Indeed, that is precisely what Colonial did for some three years. And even when a dealer decides to use Ford Credit for its financing needs, it is no more dependent on Ford Credit than it would be on any alternative source of financing.

Congress mandated that the franchise relationship —and only the franchise relationship—should be gov-

erned by the strict standards of the Franchise Act, just as it was in this case. There is no valid reason to extend the Act to other commercial arrangements.

3. Extension of the Franchise Act Beyond The Core Automobile Franchise Agreement Would Be Anti-Competitive And Would Create Additional Burdens For The Federal Courts.

Although the decision below is clearly wrong, it is not a mere aberration which can be ignored. The practical consequence of the Tenth Circuit's decision is to subject the financial affiliates of automobile manufacturers to litigation under the special standards of the Act but to leave their competitors free of such constraints and expenses. It would be patently discriminatory and anti-competitive to put affiliates of automobile manufacturers under substantial handicaps that their rivals do not bear.

The Tenth Circuit's decision constitutes nothing less than the judicial creation of a new species of federal question litigation. Unless reversed, the decision would, for the first time, permit every automobile dealer to file a lawsuit in federal court to hold non-automotive affiliates of the dealer's manufacturer to the strict standards of the Franchise Act with respect to any goods or services procured from those affiliates. As we have demonstrated, this was not the purpose of the Act; and the federal courts certainly do not need this additional business.

CONCLUSION

The decision below extends the Franchise Act to independent credit arrangements between an automobile dealer and a financial institution. It does so even though the financial institution was never a party to the manufacturer's franchise agreement, and even

though the manufacturer is directly liable to the dealer for all of its franchise obligations. Colonial does not dispute that the Tenth Circuit's ruling has this effect. To the contrary, Colonial asserts that the Tenth Circuit was correct in extending the Act to all dealings between any subsidiary of an automobile manufacturer and an automobile dealer.

The Tenth Circuit's decision is flatly inconsistent with the clear terms and legislative history of the Franchise Act as well as the decisions of every court which had previously been asked to extend the Act in such a fashion. For the reasons set forth above and in our petition, we urge that the considerable ramifications of the Tenth Circuit's unduly expansive reading of the Act be reviewed by the Court.

Respectfully submitted,

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August 16, 1979

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 6-71125

JAMES C. CHUMBLEY, and JIM CHUMBLEY CHEVROLET, INC., a Delaware corporation, *Plaintiffs,*

v.

GENERAL MOTORS CORPORATION, a Delaware corporation, and GENERAL MOTORS ACCEPTANCE CORPORATION, a New York corporation, *Defendants.*

MEMORANDUM AND ORDER

Plaintiffs, James C. Chumbley (Chumbley) and Jim Chumbley Chevrolet, Inc. (Chumbley Chevrolet), have brought this action against defendants General Motors Corporation (GMC) and General Motors Acceptance Corporation (GMAC) alleging that both defendants violated the New Car Dealer's Day in Court Act, (Dealer's Act), 15 U.S.C. § 1221, *et seq.*, Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, Section 7 of the Clayton Act, 15 U.S.C. § 18, the Civil Rights Act, 42 U.S.C. § 1982, and the Michigan Corporations Statute, MCLA § 450.1541.

Plaintiffs' complaint alleges that Chumbley entered into an agreement with GMC's Motors Holding Division (MHD) to finance the capital structure of his franchised dealership, Chumbley Chevrolet. In exchange for contributions to the capital account, Chumbley received non-voting stock and MHD received all the voting stock. It is further alleged that Chumbley could eventually buy out MHD's interest in Chumbley Chevrolet. GMAC provided financing for the Chumbley Chevrolet floor plan. Plaintiffs allege that during 1974 and 1975, the defendants wrongfully forced them to terminate their franchise and sell the dealership assets to another individual at great loss to plaintiffs.

Plaintiffs further alleged that these actions were racially motivated in that defendants insisted on plaintiffs selling their assets to a black person.

Defendant GMAC moves to dismiss Count I which alleges a cause of action under the Dealer's Act on the ground that plaintiff Chumbley is not a dealer and that GMAC is not a manufacturer within the meaning of the statute. Plaintiff Chumbley alleges, however, that by the terms of the franchise agreement he is made essential to the operation of the dealership and that he is the sole beneficial shareholder in the corporation. It is therefore clear that plaintiff Chumbley has alleged that he is a dealer within the meaning of 15 U.S.C. § 1221(c). *York Chrysler-Plymouth Inc.* v. *Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971); *Kavanaugh* v. *Ford Motor Co.*, 353 F.2d 710 (7th Cir. 1965). Whether GMAC is a manufacturer presents an issue of apparent first impression. 15 U.S.C. § 1221(c) defines manufacturer in pertinent part as any corporation "which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles." It is undisputed that GMC is a manufacturer of automobiles and that GMAC is a wholly owned subsidiary of GMC.

Defendant GMAC contends that the legislative history of the Act supports its position that it is not a manufacturer. Specifically, GMAC points to a bill introduced by Congressman Multer in the 84th Congress which enacted 15 U.S.C. § 1221 which would have specifically included individuals financing motor vehicles intended for resale. Defendant infers from Congress' rejection of this language an intent not to include those who provide financing within the coverage of the act. Plaintiffs counter that the act has a remedial purpose and that to give full effect to that purpose GMAC must be covered. Plaintiffs argue that Congress' rejection of the Multer provision merely indicates a desire to protect independent finance companies and not wholly owned subsidiaries such as GMAC. They further

argue that GMAC finances the floor plan through conditional sales contracts, thereby vesting title in GMAC prior to sale of the vehicle. Therefore, plaintiffs reason, GMAC meets the literal definition of distributor.

Initially, we reject plaintiffs' literal interpretation of "distributor." GMAC's use of a conditional sales contract, chattel mortgage or any other technical method to secure its loans cannot obscure the fact that it is merely taking a security interest in inventory. To hold that a finance company is a distributor of automobiles would hold the technical form above the substance of transaction. Our reading of the legislative history, moreover, compels us to agree with defendants' position. Although generally remedial legislation is interpreted broadly, we fail to see such a broad remedial purpose in this particular statute. The Report of the House Committee on Interstate Commerce makes clear that Congress was acutely aware that it was infringing on the freedom of contract. It, therefore, limited the purpose of the act to equalizing a "specific area of automotive distribution in which congressional committees have ascertained a present need for remedial legislation." 1956 U.S. Code Cong. & Ad. News 4596, 4601. The Report stressed that the act only applies to franchises in cars, trucks and stationwagons and does not apply to buses, motorcycles or tractors. Similarly, the act should not be stretched to cover finance companies, even when wholly owned by a manufacturer.

Both defendants move to dismiss Counts II, III, and IV, which set forth alleged violations of Sections One and Two of the Sherman Act and Section Seven of the Clayton Act. Defendants contend that Chumbley lacks standing and that these counts fail to state a claim. We agree that plaintiffs have not stated a claim and, therefore, we do not reach the standing issue. In Count III, plaintiffs do not allege that defendants have monopolized, attempted to monopolize or conspired to monopolize any product or service in commerce but rather that they are monopolizing a method of

doing business, to wit GMC franchised dealerships. Such an allegation, as a matter of law, fails to state a claim for violation of the Sherman Act § 2. *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959). Count IV must clearly be dismissed. There is no allegation that GMC acquired another corporation. Section Seven of the Clayton Act was clearly never intended to bar a corporation from *creating* a wholly owned subsidiary, or other new corporations.

Defendants also argue that Count II does not state a claim for violation of Section One of the Sherman Act. They contend that plaintiffs have alleged nothing more than a substitution of one dealer for another and that this as a matter of law cannot be an unreasonable restraint of trade. *Fray Chevrolet Sales, Inc.* v. *General Motors Corp.*, 1976 CCH Trade Cas. ¶ 60,925 (6th Cir. June 11, 1976); *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F.2d 283 (6th Cir.) *cert. denied*, 375 U.S. 922 (1963). Plaintiffs concede that defendants have a right to select their own franchisees, but attempt to distinguish between the franchise and the dealership, which they contend consists of the tangible assets and goodwill. They contend that the defendants conspired to fix the price of the dealership. We fail to see the logic of plaintiffs' position. Plaintiffs concede that the dealership is worthless without the franchise. It is impossible to attack defendants' selection of the individual to purchase the dealership without attacking defendants' selection of its own franchisees. At most, plaintiffs have alleged that GMC and GMAC have wrongfully interfered in a contractual relationship, a common law tort. They have not alleged an unreasonable restraint of trade.

Nevertheless, we cannot agree with defendants' position that they have an absolute right to select their franchisees. While the termination of one dealer and replacement by another by itself does not violate the antitrust laws, it is clear that the method of franchising can violate the antitrust laws if it produces an unreasonable restraint of trade.

Intra-brand competition is as deserving of protection as inter-brand competition. *United States* v. *Topco, Associates,* 405 U.S. 596 (1972); *United States* v. *Arnold Schwinn & Co.,* 388 U.S. 365 (1967). Thus, even where restraints are claimed to be necessary for quality control, courts have struck down franchising methods which violate Section One. *Copper Liquor, Inc.* v. *Adolph Coors Co.,* 506 F.2d 934 (5th Cir. 1975); *Adolph Coors Co.* v. *F.T.C.,* 497 F.2d 1178 (10th Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975).[1] Although plaintiffs have not specifically claimed that GMC's methods of franchising, such as the use of MHD as a holder of dealership voting stock, is an unreasonable restraint of trade, the thrust of the factual allegations may support such a position.[2] Complex issues in antitrust litigation do not lend themselves to summary disposition. *Poller* v. *Columbia Broadcasting,* 368 U.S. 464 (1962). Therefore, plaintiffs will be given an opportunity to amend their complaint to state with specificity what, if any, violation of 15 U.S.C. § 1 they intend to prove.

Defendants next contend that plaintiffs lack standing and fail to state a claim under 42 U.S.C. § 1982. Plaintiffs have acknowledged that they intended to allege a claim under § 1981, and defendants have acknowledged that they will not be prejudiced if plaintiffs amend their complaint. The allegation of a racially motivated termination clearly sets

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[1] We recognize that these cases were applying the doctrine of *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), which has been recently overruled. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* —— U.S. ——, 45 U.S.L.W. 4828 (U.S. June 23, 1977). *Continental,* however, merely holds that vertical territorial restraints are not per se unreasonable restraints of trade. The opinion continues to recognize the importance of intra-brand competition and does not give a franchisor license to restrain trade among its franchisees in whatever manner it chooses.

[2] *See, e.g.,* Judge Will's characterization of a similar Chrysler plan in *Madsen* v. *Chrysler Corp.,* 261 F.Supp. 488, 499 (N.D. Ill. 1966), *vacated as moot,* 375 F.2d 773 (7th Cir. 1967).

forth a claim under § 1981. *McDonald* v. *Santa Fe Trail Transportation Corp.*, 44 U.S.L.W. 5067 (U.S. June 25, 1976). Therefore, plaintiffs will be permitted to amend their complaint to substitute § 1981 for § 1982. Defendant GMAC has also moved to dismiss this count, but plaintiffs have admitted that this claim is only directed against GMC.

Finally, defendant GMAC moves to dismiss Count VI, the state cause of action for breach of fiduciary duty by GMC as majority shareholder of Chumbley Chevrolet. Plaintiffs have admitted that this count is directed only against GMC and GMC has specifically not joined in GMAC's motion. The motion is, therefore, moot. The court must, however, dismiss Count VI for lack of jurisdiction. The corporate plaintiff and both defendants are Delaware corporations; therefore, the court does not have jurisdiction under 28 U.S.C. § 1332. The court also finds that it does not have pendant jurisdiction. All federal claims deal with the external relationships between Chumbley Chevrolet and GMC and GMAC. Count VI, however, deals solely with the internal operations of Chumbley Chevrolet.

Accordingly, It Is Ordered that defendant GMAC's motion to dismiss Counts I, III, IV, V, and VI be and the same hereby is granted;

It Is Further Ordered that defendant GMAC's motion to dismiss Count II be and the same hereby is denied;

It Is Further Ordered that defendant GMC's motion to dismiss Counts III and IV be and the same hereby is granted;

It Is Further Ordered that defendant GMC's motion to dismiss Counts II and V be and the same hereby is denied;

It Is Further Ordered that Count VI be and the same hereby is dismissed for lack of jurisdiction over the subject matter;

IT IS FURTHER ORDERED that plaintiffs shall, within 45 days from the date of this order file an amended complaint setting forth with specificity what plaintiffs contend to be violations of the Sherman Act and substituting § 1981 for § 1982, if plaintiffs wish to proceed with Count V.

/s/ ROBERT E. DEMASCIO
Robert E. DeMascio
United States District Judge

Dated: September 19, 1977.

Pursuant to Rule 77(d), Fed.R.Civ.P., copies mailed to attorneys for all.